Supreme Court, U.S.
FILED
NO. 941494 MAR 10 1995
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ERPENBECK COMMERCIAL ENTERPRISES, INC.,
Petitioner

v.

BOONE COUNTY FISCAL COURT,
BOONE COUNTY PLANNING COMMISSION,
Respondents

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

ALEX F. TALBOTT
2100 National City Tower
Louisville, Kentucky 40202
Telephone (502) 582-1891

Counsel for the Petitioner

March 1995

96 pp

QUESTION PRESENTED

Does Agins[1] approve a zoning ordinance that conditions all development on an ad hoc, standardless review by the local politicians, or, on the contrary, does such an ordinance constitute an effective denial of all use of the land thereby violating the Lucas[2] Taking rule, and does such an ordinance constitute an arbitrary condition of development thereby violating the Dolan[3] Taking rule?

---

[1] Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

[2] Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[3] Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

LIST OF PARTIES

Erpenbeck Commercial Enterprises, Inc. ("Erpenbeck") is the Petitioner.

Enterprise VI, a Kentucky General Partnership consisting of Albert J. Vesper III (also acting as Guardian of the Estate of Alicia Vesper), Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper, and Dennis J. Vesper ("Enterprise VI"), also a Petitioner below in a consolidated action, has elected to file a separate petition for writ as provided by Rule 12.2.

The Boone County Fiscal Court ("Fiscal Court") and the Boone County Planning and Zoning Commission ("Planning Commission") are the Respondents.

On the question presented, the aforementioned parties and the parties to the proceedings below are identical.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

1. Conflict between states 7

2. Clear but not recently visited unconstitutionality in a slightly novel setting 7

3. Kentucky's strained interpretation of recent U.S. Supreme Court opinions 8

4. Rapid acceleration of a nationwide problem 9

5. Essentially same issue reserved in prior decision now clearly presented 9

6. Uncomplicated facts with available procedures fully pursued 10

CONCLUSION 10

APPENDIX ---

Kentucky Supreme Court Order Denying Discretionary Review 12

Kentucky Court of Appeals Order Denying Petition for Rehearing 13

Kentucky Court of Appeals Order Affirming Judgment of the Boone Circuit Court 15

Boone Circuit Court Opinion and Order Granting Defendants Summary Judgment 26

Erpenbeck Commercial Enterprises, Inc.'s Amended Complaint 36

Article 15 of the Ordinance 53

Lane H. Kindig, "Stop the Insanity," Jan., 1995, Land Use Law & Zoning Digest, published by American Planning Association 65

TABLE OF AUTHORITIES

Cases: ..... **Page**

First English Evangelical Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) 6

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) 6, 8, 9

Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) 6, 9

Anderson v. City of Issaquah, 70 Wash. App. 64, 851 P.2d 744, 751 (1993) 7

Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322 (1926) 7

Grayned v. City of Rockford, 408 U.S. 102, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) 7

City of Buford v. Ward, 212 Ga. App. 752, 443 S.E.2d 279 (1994) 7

Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928) 8

Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) 8

Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) 9

Pennell v. City of San Jose, 108 S.Ct. 849 (1988) 9

Yee v. Escondido, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 9

Statutes and Constitutional Provisions: ..... Page

28 U.S.C. §1257 2

Fifth Amendment to the U.S. Constitution 2

Fourteenth Amendment to the U.S. Constitution 2

42 U.S.C. §1983 3

42 U.S.C. §1988 3

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ERPENBECK COMMERCIAL ENTERPRISES, INC.,
Petitioner

v.

BOONE COUNTY FISCAL COURT,
BOONE COUNTY PLANNING COMMISSION,
Respondents

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The Order of the Supreme Court of Kentucky denying discretionary review (App., p.12) is unreported. The Orders of the Kentucky Court of Appeals denying petition for rehearing and affirming the judgment of the Boone Circuit Court (App., p.13) are unreported. The

Order of the Boone Circuit Court granting Defendants summary judgment (App., p.26) is unreported.

JURISDICTION

The Supreme Court of Kentucky entered its judgment on December 14, 1994 (App., p.12). This Petition has been filed within 90 days after the entry of said judgment. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

"No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable to the party injured and in action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988 provides:

"In any action . . . to enforce . . . 42 U.S.C. §1983, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

In 1989, the seller, Enterprise VI, and the buyer, Erpenbeck, had a purchase contract subject to zoning approval of a second deal in which Erpenbeck was to sell a portion of the same land to Hyper Shoppes for a Biggs department store.

The Respondent County's amendment of the Comprehensive Plan in 1986 showed most of the Biggs portion of the property to be commercial, and, in conjunction with Plan amendments, the zoning was changed from I-1, an industrial zone, to C-2/PD, a

commercial zone with a "planned development overlay." The entire tract is 264 acres and is undeveloped. It adjoins the Greater Cincinnati and Northern Kentucky International Airport on one side and a four-lane state highway on the other. The non-commercial portion is all zoned industrial.

The C-2 zone without the PD is a traditional district which allows over 200 possible uses subject only to objective requirements, such as height limits in feet, setback limits in feet, parking spaces and the like which have readily understood effects. However, the PD subjects all 200 possible uses of the C-2 zone to, in the words of the state court majority, "an extra layer of regulatory review." The majority opinion quoted language of the ordinance referring to "imaginative designs" which "may" be allowed if found "compatible." Neither the County nor the majority opinion disputes the words of the dissent concerning the ordinance:

> ". . . the commercial two (C-2) planned development (PD) zone . . . contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the fiscal court."

On submission for ministerial approval of the Biggs plan, which was in accord with all objective criteria of C-2, the Petitioners were advised that the standardless review applied to all 200 possible uses regardless of intensity. In an effort to mitigate their damages and exhaust

administrative remedies, they submitted to the standardless procedure. Following denial of the Biggs plan by the Planning Commission, Hyper Shoppes cancelled the deal and Erpenbeck failed to close, forfeiting its $150,000.00 deposit.

A few months later, the Biggs project was approved for land owned by one of the largest clients of the Planning Commission's Chairman even though the approval admittedly violated the Comprehensive Plan.

The record confirms that the trial court's opinion granting summary judgment to the Respondents was written by the Respondents' attorney with some modifications by the trial court. That opinion is rife with improper findings on disputed facts. However, the improper findings were cleaned up and not repeated by the Court of Appeals majority. Note, for example, that the Court of Appeals did not rely on the nine-acre overlap of employee parking into the I-1 industrial zone. Red herrings of that nature, written by the Respondents' attorney into the trial court opinion, will not cloud the clear constitutional issue.

The C-2/PD zone conditions all development on a standardless review. Petitioners contend that this fact equates the case with First English[4] and Lucas,[5] essentially depriving the Petitioners of all use. The majority of the Kentucky Court of Appeals approved application of the zone and denial of the Biggs project because a similar ordinance was referred to in Agins[6] and was not condemned in that opinion. However, the plaintiff in Agins made no attack on the ordinance for its standardless features and did not present a plan that conformed to the underlying zoning. In contrast with Agins, the Biggs department store was a permitted use in the straight C-2 zone, but was nevertheless denied by using the standardless procedure.

The majority also believed that Lucas stands for the proposition that, because the Petitioners' prior zoning was an industrial district which would not have allowed the Biggs project, the Petitioners could not prevail even if the C-2/PD is unconstitutional, despite the fact that the Comprehensive Plan now designates the property commercial. This interpretation is allegedly gleaned from Lucas' reference to prior uses allowed or prohibited by the common law.

---

[4] First English Evangelical Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

[5] Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[6] Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

The federal questions involved herein were raised in the Amended Complaint filed in the trial court, and were ruled on by the trial court and the Court of Appeals. The Kentucky Court of Appeals is the highest state court available to the Petitioners because the Kentucky Supreme Court denied the Petitioners' Motion for Discretionary Review.

REASONS FOR REVIEW

1. Contrary to Kentucky, the State of Washington determined that a development condition that requires standardless review violates the U.S. Constitution as interpreted by the U.S. Supreme Court. Anderson v. City of Issaquah,[7] citing Connally v. General Const. Co.[8] See also, Grayned v. City of Rockford[9] and City of Buford v. Ward.[10] Washington is correct, Kentucky is wrong, and the supreme law of the land should apply uniformly in every state.

2. Standardless ad hoc review of land development that allows no use as a matter of right is the same as absolute control and constitutes a taking according to Lucas. It fails to advance a legitimate state interest, and

---

[7] Anderson v. City of Issaquah, 70 Wash. App. 64, 851 P.2d 744, 751 (1993).

[8] Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322 (1926).

[9] Grayned v. City of Rockford, 408 U.S. 102, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[10] City of Buford v. Ward, 212 Ga. App. 752, 443 S.E.2d 279 (1994).

constitutes a taking according to Nectow.[11] It violates procedural due process because the landowner has no advance notice of what is required, and it violates substantive due process because the result will necessarily be arbitrary, having no basis in prior written law. It violates the Equal Protection Clause, as shown by the subsequent approval for the Chairman's client, because treating everyone by the same standards is impossible when there are no standards. This condition of development is, therefore, arbitrary and unconstitutional, and such conditions are condemned by both the majority and the dissent in Dolan.[12]

3. The Kentucky majority's strained interpretations of Agins and Lucas are a blatant affront to this U.S. Supreme Court apparently motivated by a desire to protect Boone County from the naturally occurring liability resulting from the damage done by misuse of its standardless review.

---

[11] Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928).

[12] Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

4. Standardless review procedures that are a pre-condition of any use constitute a dramatic leap from the traditional type of zoning facially approved by Euclid v. Ambler,[13] and yet such procedures are proliferating rapidly and are now viewed as a major problem nationwide. See the attached recent article called "Stop the Insanity," by Lane H. Kindig published by the American Planning Association in Land Use Law and Zoning Digest, January, 1995. App. p.73.

5. The essentially same issue of a required standardless review procedure was referred to in Pennell[14] and in Yee,[15] but it was not resolved because it was not clearly presented. In Pennell, there had been no application of the "hardship to a tenant" provision of the ordinance, and in Yee, the petitioners had failed to "run the gauntlet" of the procedure under attack. In this case, the issue is clearly presented.

---

[13] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[14] Pennell v. City of San Jose, 108 S.Ct. 849 (1988).

[15] Yee v. Escondido, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

6. Because the matter was decided on summary judgment, the facts are clear and uncomplicated as shown by the Court of Appeals majority and dissenting opinions. Improper factual findings written into the trial court's "Opinion" by the County's attorney were properly ignored by the Court of Appeals. These hackneyed canards will likely be repeated in response to this Petition, but they should be ignored as the Court of Appeals did. The U.S. Supreme Court will be able to limit its consideration to the facts and federal questions that were specifically dealt with and relied on by the Court of Appeals.

CONCLUSION

The Court should declare that enforcement of the ordinance was a violation of the Petitioners' constitutional rights to compensation, due process and equal protection. The matter should be returned to the state court system for a determination as to the amount of damages, if any, occasioned by the violation, and an award of attorney fees.

Respectfully submitted,

ALEX F. TALBOTT
2100 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202
Phone: (502) 582-1891
Counsel for Petitioner

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ERPENBECK COMMERCIAL ENTERPRISES, INC.,
Petitioner

v .

BOONE COUNTY FISCAL COURT,
BOONE COUNTY PLANNING COMMISSION,
Respondents

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI
APPENDIX

Supreme Court of Kentucky
94-SC-769-D & 94-SC-778-D
(92-CA-3110-MR & 93-CA-262-MR)

ENTERPRISE VI, A KENTUCKY
GENERAL PARTNERSHIP, ET AL. MOVANTS

BOONE CIRCUIT COURT
V. 90-CI-174

BOONE COUNTY FISCAL COURT, ET AL. RESPONDENTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC. MOVANT

V. BOONE CIRCUIT COURT
90-CI-175

BOONE COUNTY FISCAL COURT, ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decisions of the Court of Appeals are denied.

ENTERED December 14, 1994.

Robert F. Stephens

Chief Justice

Commonwealth of Kentucky
Court of Appeals
NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY
GENERAL PARTNERSHIP,
ALBERT J. VESPER, III,
RONALD J. VESPER,
PAUL J. VESPER,
STEPHEN J. VESPER,
DENNIS J. VESPER and
ALBERT J. VESPER, III
(GUARDIAN OF ALICIA VESPER ESTATE) APPELLEES

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE FISCAL COURT AND
BOONE COUNTY PLANNING
COMMISSION APPELLEES

AND: NO. 93-CA-000262-MR

ERPENBECK COMMERCIAL
ENTERPRISES, INC. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE COUNTY PLANNING
COMMISSION and BOONE
COUNTY FISCAL COURT APPELLEES

ORDER DENYING PETITION FOR REHEARING

* * * * *

BEFORE: LESTER, CHIEF JUDGE; GARDNER, JUDGE and VANCE, SPECIAL JUDGE.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

Charles B. Lester

JUDGE, COURT OF APPEALS

ENTERED: AUG 26 1994

RENDERED: May 13, 1994; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals
NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY GENERAL PARTNERSHIP, ALBERT J. VESPER, III, RONALD J. VESPER, PAUL J. VESPER, STEPHEN J. VESPER, DENNIS J. VESPER and ALBERT J. VESPER, III (GUARDIAN OF ALICIA VESPER ESTATE) — APPELLEES

APPEAL FROM BOONE CIRCUIT COURT
V. HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE FISCAL COURT and BOONE COUNTY PLANNING COMMISSION — APPELLEES

AND

NO. 93-CA-000262-MR

ERPENBECK COMMERCIAL ENTERPRISES, INC. — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
V. HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

BOONE COUNTY PLANNING COMMISSION and BOONE COUNTY FISCAL COURT — APPELLEES

OPINION
AFFIRMING
* * * * * * * *

BEFORE: LESTER, CHIEF JUDGE, GARDNER, JUDGE, and VANCE, SPECIAL JUDGE.

GARDNER, JUDGE: Appellants, Erpenbeck Commercial Enterprises, Inc. (Erpenbeck) and Enterprises VI and various members of the Vesper family (hereinafter collectively referred to as Enterprise) appeal separately from a summary judgment entered by the Boone Circuit Court in favor of the appellees, Boone County Planning Commission (Planning Commission) and Boone County Fiscal Court (Fiscal Court). After carefully reviewing the record, this Court must affirm.

Enterprise owned 263 acres of commercially and industrially zoned property located on Kentucky Highway 18 in Boone County, Kentucky. In 1986, this property had been rezoned from Industrial One (I-1) to Commercial Two (C-2), Planned Development (PD) zone. The C-2/PD allowed a baseline C2/commercial development subject to an extra layer of regulatory review pursuant to Article 15 of the zoning ordinance. Erpenbeck contracted to buy the 263-acre tract from Enterprise for approximately $27,000 per acre.[1] At the same time, Erpenbeck entered into a contract to sell 43 acres of this tract to Hyper Shoppes, Inc. (Hyper), and Hyper planned to construct a Biggs Department Store on the site. The alleged price was $120,000 per acre. The front 34.8 acres of this tract was zoned C-2/PD and the remaining nine acres were zoned I-1. The contract between Hyper and Erpenbeck allowed Hyper to pull out of the deal prior to February 28, 1990, or 30 days after the Fiscal Court approved the proper zoning, without suffering any penalty.

[1]Erpenbeck had also earlier paid $250,000 to Donald and Debra Streck. The Strecks and Erpenbeck had been negotiating with Hyper Shoppes, Inc. concerning a Biggs Store project. This payment made on June 19, 1989, was for acquiring all rights the Strecks might have. Erpenbeck later sought this amount as damages.

Erpenbeck filed an application with the Planning Commission on November 1, 1989, for zoning approval of the Biggs project under the C-2/PD zone.[2] A public hearing on the matter was held on December 6, 1989. The proposed plan showed the buildings in the C-2/PD zone and the parking lot/loading area extending into the I-1 zone. The Planning Commission after reviewing the Biggs plan, the Comprehensive Plan, and hearing all of the evidence, recommended rejection of the proposed Biggs project on January 3, 1990. The reasons for rejection included potential traffic problems and incompatibility with the 1986 Comprehensive Plan. On January 11, 1990, Hyper terminated its contract with Erpenbeck. Further, the record reflects that Erpenbeck's option to purchase Enterprise's property expired on February 1, 1990, without being exercised.[3] The Fiscal Court decided on February 6, 1990, to uphold the Planning Commission's decision and formally deny Erpenbeck's application for the Biggs project.

Appellants sought relief in Boone Circuit Court through a declaratory rights action under Chapter 418 of the Kentucky Revised Statutes (KRS). They sought monetary damages based upon violations of KRS 446.070, and KRS Chapter 100, and based upon their claim of an alleged regulatory taking of the property by the appellees. They also brought claims pursuant to 42 U.S.C. Sections 1983 and 1988. The circuit court in an opinion and order of November 20, 1992, granted the defendants' motion for summary judgment. The circuit court ruled that any appeal from the Fiscal Court's decision was moot because there could be no practical effect by reversing since the Biggs deal was no longer viable, and the property had been rezoned again. The court found no legal support for any of Erpenbeck's and Enterprise's claims. Erpenbeck and Enterprise both appealed to this Court.

---

[2]Erpenbeck also sought to have the zoning line changed, but its proposal was rejected by the Board of Zoning Adjustment. Apparently, no appeal was taken.

[3]Erpenbeck lost $150,000 "good faith" money as a result of this termination and sought this amount as part of its damages.

One of the first considerations for this Court is the mootness issue. The circuit court found that a direct appeal from the Fiscal Court's decision regarding the Biggs proposal was a moot issue, because no practical effect could be gained by reversing the Fiscal Court's decision. There could be no practical effect, because Hyper had terminated the Erpenbeck agreement weeks prior to the Fiscal Court's decision, and Erpenbeck's contract with Enterprise had terminated on February 1, 1990. This Court agrees that the issue of any specific requested relief is moot, because there is no longer a viable

Biggs project for the property in question. This Court was presented with a substantially similar situation in Bourbon County Joint Planning Commission v. Simpson, Ky. App., 799 S.W.2d 42 (1990), and held that there could be no practical effect. Thus, we turn to the appellants' claims for damages.

Appellants maintain that the circuit court erred in failing to recognize the validity of their causes of action and in not setting the matter for trial on the question of damages and causation. They first attack the constitutionality of Article 15, the Planned Development Section, of the Boone County Zoning Laws.[4] They contend that the ordinance lacks any ascertainable standards for applicants and creates arbitrary power in local zoning officials in violation of Kentucky

---

[4]The appellants did not provide a copy of Article 15 of the zoning ordinance with their briefs or provide a specific citation to the record so that this Court could locate it. Coincidentally and luckily, this Court found Article 15 when looking through exhibits provided with the record. This Court reiterates that it is not our job to search a record for testimony or items where no reference to the record is furnished. Younq v. Newsome, Ky., 462 S.W.2d 908, 910 (1971); Ventors v. Watts, Ky. App., 686 S.W.2d 833, 834-835 (1985). Further, CR 76.12(4)(c)(iv) provides that an appellant's brief shall contain an argument with ample supportive references to the record and citations of authority pertinent to each issue of law. Pierson v. Coffer, Ky. App., 706 S.W.2d 409, 413 (1985).

Constitution, Section 2. They also argue that the planned development provisions violate the limitations placed upon a county's zoning power by KRS, Chapter 100. The crux of their argument is that the C-2/PD ordinance provides a property owner with no uses for the property. This Court must disagree.

Article 15 defines and governs planned development in Boone County. It states, "Planned Development (PD) is a special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs." It also provides,

> Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

This Court finds that the circuit court correctly found that Article 15 is not violative of the Kentucky Constitutional provisions and KRS, Chapter 100. The circuit court correctly ruled that KRS, Chapter 100 provides for flexible planned development type regulations. As correctly stated by the circuit court, substantially similar zoning provisions were upheld in Bellemeade Co. v. Priddle, Ky., 503 S.W.2d 734 (1973). The Court in that case held that none of the statutes in KRS, Chapter 100 rendered planned neighborhood development zoning impermissible and also upheld the zoning against constitutional attack. The Court found that the zoning provisions were not void for lack of standards. In Danville-Boyle County Planning and Zoning Commission v. Prall, Ky., 840 S.W.2d 205 (1992), planned development statutes that were even more similar to those in the instant case were upheld by the Kentucky Supreme Court after being attacked on similar grounds. See also Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). There is a presumption favoring the validity of a zoning ordinance, and the burden is upon

those attacking it to prove that it is arbitrary. Clark v. City of Paducah, Ky., 439 S.W.2d 84, 86 (1969). If there is no more than a doubt about an ordinance's validity, it must stand as a valid exercise of the police power. Id.

Thus, this Court finds as a matter of law that the PD zoning provision in the instant case was not unconstitutional or in violation of KRS, Chapter 100. Article 15 expands already existing uses. Enterprise's property was originally zoned I-1, and by changing the zoning to C-2/PD, the appellees were expanding the potential uses of the property. Further, the record reflects that Erpenbeck received an adequate hearing on all facets of its plan for the Biggs store, and there is substantial evidence to support the Planning Commission's and the Fiscal Court's findings. See Danville-Boyle Counts Planning and Zoning Commission v. Prall, 840 S.W.2d at 108; American Beauty Homes Corp. v. Louisville and Jefferson Counts Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). The record reflects that a lot of careful thought and analysis went into the Planning Commission's recommendations about the Biggs proposal. Thus, the appellants' argument that the ordinance and its application in this case was arbitrary must fail. The statutes in Colyer v. City of Somerset, 306 Ky. 797, 208 S.W.2d 976 (1947); Board of Trustees of Town of Bloomfield v. Bayne, 206 Ky. 68, 266 S.W. 885 (1924), and other cases cited by appellants are fundamentally distinguishable.

Appellants also argue that as a matter of law, the enforcement of the PD zoning ordinance constitutes a taking of their property. They contend that the ordinance's application violates the Fifth Amendment to the United States Constitution and Section 242 of Kentucky's Constitution, because of the alleged taking without compensation. The circuit court's finding that a taking did not occur must be upheld.

Generally, a taking occurs when an owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good. Lucas v. South Carolina Coastal Council, _____ U.S. _____, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992). In deciding whether a taking has occurred, a court must consider the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Williamson Counts Regional Planning Commission v. Hamilton Bank

of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985). A land use regulation does not affect a taking if it substantially advances legitimate state interests. Id. A state or local government may in exercise of its police powers, incidentally restrict property rights of individuals for the common good without payment. Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Co., Ky., 563 S.W.2d 471, 473 (1978). The action taken must bear a real and substantial relation to the public heath, safety, morality or general welfare. Id. The takings clause clearly does not require compensation when an owner is barred from putting land to use that is proscribed by existing rules; if the proposed uses are not part of the title to begin with, then there is no taking. Lucas v. South Carolina Coastal Council, 112 S.Ct. at 2901.

Almost invariably, some property owners suffer an actual or speculative financial loss as the result of zoning restrictions, but the mere fact that a forbidden use would be more profitable is not an unwarranted hardship which requires a finding of arbitrary action. Clark v. City of Paducah, 439 S.W.2d at 86. A diminution in property value alone does not constitute a taking; owners cannot show a taking simply by stating that they have been denied a property interest they heretofore had believed was available for development. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978). In Agins v. City of Tiburon, supra the Court upheld a planned development zoning scheme. The court ruled that no taking had occurred as the planned development advanced legitimate governmental goals and was part of the police power. Id., 100 S.Ct. at 2142. A court must consider the benefit to the public as a whole along with any diminution in market value the owner might suffer. Id.

As a matter of law, no taking occurred in the instant case. The Fiscal Court simply denied a single project to occur on the property owned by Enterprise.[5] There was no rezoning at question in this case; the property was zoned C-2/PD when Erpenbeck entered

[5]Erpenbeck never actually owned or had legal title to the property in question as it allowed the option to expire without purchasing the property. See Monticello Co. v. Commonwealth Natural Resources and Environmental Protection Cabinet, Ky. App., 864 S.W.2d 921 (1993).

into the agreement with Enterprise and when Erpenbeck entered into the agreement with Hyper. All parties knew the zoning status when they entered into the deal. There are over 200 possible uses allowed under the C-2 zone. In this case, the Planning Commission and Fiscal Court simply denied one project. The reports regarding the proposed project were very thorough. The Planning Commission was trying to advance substantial goals by avoiding excessive traffic and pedestrian congestion, damage to the natural corridor and growth that was not in keeping with the Comprehensive plan. The property had been previously all zoned I-1 and part of it remained zoned I-1 Such a project was clearly prohibited in I-1. Appellants have simply failed to show that a taking occurred in the instant case. This case is more akin to Agins v. City of Tiburon, supra, and is fundamentally distinguishable from cases cited by appellants.

Appellants also argue that because they were deprived of valuable property rights without substantive or procedural due process of law in violation of the Fourteenth Amendment to the United States Constitution, they are entitled to relief pursuant to 42 U.S.C. SS 1983 and 1988. This argument is totally without merit.

42 U.S.C. S 1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A person seeking damages under 42 U.S.C. S 1983 must prove actual injury caused by a denial of his or her constitutional rights. Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986). There must be a sufficient property or liberty interest shown. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972).

Appellants have made absolutely no showing that they are entitled to relief pursuant to 42 U.S.C. SS 1983 and 1988.[6] The cases cited by them are clearly not applicable to the case at bar. This Court has already found that the zoning ordinance in question was constitutional. As discussed earlier, the record shows that Erpenbeck received a fair hearing, and that there was substantial evidence to support the Planning Commission's and Fiscal Court's decision. There has been no showing of a violation of substantive or procedural due process. Appellants have also failed in proving there was a taking.

Erpenbeck also argues that as a matter of law, appellants have a valid cause of action pursuant to KRS 446.070 for enforcing an ordinance that violated KRS, Chapter 100, and for denying a permit in violation of KRS 522.030. This argument again totally lacks merit. We have ruled earlier in this opinion that Article 15 of the Boone County Zoning Ordinances did not violate Chapter 100 of the KRS. Further, there has been no showing of official misconduct as discussed in KRS 522.030.

Enterprise contends that there were factual issues regarding the appellants' claim of intentional interference with contractual relations. This argument is unfounded as there has been absolutely no showing that the elements of this tort as outlined in National Collegiate Athletic Ass'n., By and Through Bellarmine College v. Hornung, Ky., 754 S.W.2d 855 (1988), exist in the case at bar.

Enterprise lastly argues that the circuit court erred by failing to allow discovery of certain documents. Enterprise has presented no

---

[6]There is also an issue as to whether an action pursuant to 42 U.S.C. S 1983 was even appropriate in this case, since appellants had not exhausted their state claims or remedies when they brought the action. It has been held that persons bringing 42 U.S.C. S 1983 claims must exhaust all state claims and show that state remedies are inadequate. Williamson Counts Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S.Ct. at 3121; Hammond v. Offutt, 866 F.2d 172 (6th Cir. 19B9); Presley v. Board of Education of Martin Counts, Xy. App., 859 S.W.2d 133-134 (1993). Appellants were still pursuing state avenues.

authorities to support its position, and has not specifically identified the documents in question. We have reviewed the record and can find no error on this ground.

Finally, the appellants argue that the circuit court erred by signing an opinion and order prepared by the appellees which granted summary judgment and dismissed all of the appellants' claims. They contend that there were factual issues remaining, and factual conclusions were misstated by the circuit court.

In Kentucky, a summary judgment should be entered if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56.03. The record must be viewed in a light most favorable to the party opposing the motion, and all doubts are to be resolved in his or her favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). A trial court must only grant a motion for summary judgment if it appears that it would be impossible for the respondent to produce evidence warranting a favorable judgment against the movant. Id.; Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

In the instant case, there were no genuine issues of material fact. The issue regarding whether Hyper cancelled its contract as a result of the zoning process is immaterial since this Court has found that the zoning ordinance, procedures, and ultimate decision were valid, and since Hyper could pull out for any reason under the terms of the contract with Erpenbeck.

For the foregoing reasons, the judgment of the Boone Circuit

Court is affirmed.

LESTER, CHIEF JUDGE, CONCURS.

VANCE, SPECIAL JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

VANCE, SPECIAL JUDGE, DISSENTING. I respectfully dissent from the majority opinion which affirms the summary judgment entered by the trial court. I would hold that the commercial two (C-2) planned development (PD) zone violates the constitution of Kentucky, because it contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the fiscal court.

ATTORNEY FOR APPELLANTS, ENTERPRISES and VESPERS:

Paul J. Vesper
Covington, Kentucky

ATTORNEY FOR APPELLANT, ERPENBECK COMMERCIAL ENTERPRISES, INC.:

Alex Talbott
Louisville, Kentucky

ATTORNEYS FOR APPELLEES:

Larry J. Crigler
Burlington, Kentucky

David A. Schneider
Florencef Xentucky

Dale T. Wilson
Florence, Xentucky

BOONE CIRCUIT COURT
CONSOLIDATED CIVIL ACTION NOS. 90-CI-174 AND 90-CI-175

ENTERPRISE VI, ET AL — APPELLANTS/ PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/ DEFENDANTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC., ET AL — APPELLANTS/ PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/ DEFENDANTS

OPINION AND ORDER
GRANTING DEFENDANTS SUMMARY JUDGMENT

****

Erpenbeck Commercial Enterprises, Inc. (Erpenbecks), Enterprise VI, and Albert J. Vesper, III (Vespers), appeal Boone Fiscal Court's decision of February 6, 1990. That decision denied Erpenbecks' application under Article 15 of Boone County's zoning regulations to approve a Biggs hypermarket retail center on 43.45 acres owned by Vespers. Their consolidated appeals are pursuant to K.R.S. 100.347. Vespers appeal under this statutory authority even though they were not applicants to Erpenbecks' submitted application.

Vespers and Erpenbecks also seek declaratory judgment relief and money damages from Boone Fiscal Court. They contend Article 15 is unauthorized as zoning regulations under Chapter 100 and that Fiscal Court's actions constitute a compensable taking. They assert inverse condemnation, tortious interference with contractual

relations, constitutional violations and violations of state and federal law to support the money damages claims.

The Boone County Planning Commission, organized under Chapter 100, recommended Erpenbeck's application be denied. Fiscal Court and Planning Commission members were sued individually but dismissed as defendants. All remaining parties have moved for summary judgment.

Fiscal Court and the Planning Commission argue that none of their actions caused damage or injury entitling plaintiffs to relief. From the undisputed material facts and applicable law, this Court agrees.

Facts

On July 21, 1989, Erpenbecks contracted to purchase Vespers' 264 acres located on the north side of Kentucky Highway 18, between Zig Zag Road and Old Limaburg Road. All 264 acres had to be purchased and full payment of the S7,250,000.00 price made no later than February 1, 1990. Vespers retained the 150,000.00 earnest money, Erpenbecks having failed to fulfill this contract.

Erpenbecks previously paid $250,000.00 to Donald and Debra Streck and Streck's corporation. Strecks and Erpenbecks had been negotiating with Vespers and Biggs parent company, Hyper Shoppes, Inc., to acquire the Vesper property and sell part of it to Biggs. This payment, made on June 19, 1989, acquired all rights Strecks might have, even though no contracts then existed with Vespers or Biggs.

Erpenbecks had no agreement with Biggs until August 17, 1989. Biggs reserved the right to terminate the agreement for any reason, in its sole discretion and judgment and could have done so prior to February 28, 1990, or 30 days after Fiscal Court approved Erpenbeck's proposal, whichever was later. On January 11, 1990, Biggs terminated the agreement with Erpenbecks, approximately 3 weeks before Fiscal Court acted. Further, since Erpenbecks failed to fulfill their contract with Vespers by purchasing all 264 acres no later than February 1, 1990, that contract became null and void by its own terms. When Fiscal Court acted on February 6, 1990, Erpenbecks no longer had a contractual interest in the property comprising their application.

Erpenbeck's application comprised 43.45 acres that was part of the Vesper property. Only 34.8 acres was zoned for commercial retail use and was subject to a planned development overlay classification under Article 15. The remaining approximate 9 acres was zoned industrial, not commercial retail, and was not subject to a planned development overlay review. None of the 43.45 acres has ever been zoned to allow as a matter of right the Biggs retail center.

Fiscal Court so zoned this 43.45 acres in 1986 as part of the county-wide zoning update. Prior to that time, all of the 264 acres was zoned industrial. The C-2/PD provided an opportunity that the Vesper property previously never had. It allowed commercial development, subject to the extra layer of regulatory review under Article 15. That review would allow commercial development compatible with the 1986 comprehensive plan. Erpenbecks knew the Vesper property's zoning classification in June, 1989. They acknowledged that classification in the contracts with Vesper and Biggs, providing that zoning approval required Fiscal Court approving Erpenbeck's application and concept development plan by enacting an ordinance.

Erpenbecks submitted their application for a Biggs hypermarket retail center on November 1, 1989. It sought approval for 417,600 square feet of regional retail space on the 34.8 acres commercially zoned. All the shipping and receiving area and some of the 2,113 parking spaces needed for this intense regional retail development extended into the industrial zone. These facilities were exclusively to serve the commercial development and were not accessory to any industrial use in the industrial zone. Plaintiffs argue that this approximate 9 acre overlap imposes no adverse land use impact since parking and shipping areas are allowed in the industrial zone to serve industrial users. The distinction, however, is that by allowing the commercial regional retail development to extend by this magnitude into the industrial zone, the massive commercial development in the C-2/PD zone becomes larger, generating higher volumes of regional retail traffic.

The 1986 Boone County Comprehensive Plan recommends that this segment of Kentucky 18 be commercially developed, but not for regionally oriented massive retail that generates high volumes of traffic. That type of regional retail development is identified as

being more appropriate and suitable for areas closer to the interstate highway system, such as Mall Road. For this reason, the Commission recommended and the Fiscal Court zoned the property with a planned development overlay. Without that regulatory review process it would not have been consistent with the comprehensive plan to zone the area commercial two. That zoning classification, without a planned development overlay, would have allowed massive regionally oriented retail development, contrary to the comprehensive plan.

For Erpenbecks, it was crucial that Biggs purchase the 43.45 acres. Without that purchase, Erpenbecks would not close with Vespers on the 264 acres. While Biggs purchase was crucial to Erpenbecks, Biggs at no time was obligated to perform under its agreement with Erpenbecks. When Biggs terminated, it was entitled to a complete refund of its earnest money, with accrued interest. At that time, Biggs did not know costs for the concept development plan had exceeded the only installment paid for those costs of $50,000.00. Only to compromise a dispute with Erpenbecks did Biggs pay more than that installment of $50,000.00 for development plan costs.

The facts further clearly show that even had the Erpenbeck application received Fiscal Court approval, it was not fully acceptable to Biggs for purchase purposes. Biggs wanted the retail center building located to the rear of the 43.45 acres, in the industrial zone. That placement would provide a larger parking field between the retail center and Kentucky 18 and was necessary to make the plan more acceptable to Biggs. Pierre A. Wevers, executive vice-president of Hyper Shoppes considered placing the Biggs retail center in the industrial zone part of the general process of the Erpenbeck plan getting zoning approval. Michael C. Phillips, then Director of Real Estate for Hyper Shoppes, oversaw this project for Biggs. Being unable to place the hypermarket building in the industrial zone meant, to him, that the site and Erpenbeck's plan was unacceptable and unusable for a Biggs. Even had Fiscal Court approved the Erpenbeck plan, there is no evidence Biggs would have purchased the 43.45 acres.

From the undisputed facts, the following dates are significant:

1. June 19, 1989 - Erpenbecks $250,000.00 payment to Strecks;

2. July 21, 1989 - Date of Vesper-Erpenbeck Contract;

3. August 17, 1989 - Date of Erpenbecks-Biggs (Hyper Shoppes) Contract;

4. November 1, 1989 - Erpenbeck application filed with Commission;

5. December 6, 1989 - Public Hearing date before Commission;

6. January 3, 1990 - Commission recommendation to Fiscal Court;

7. January 11, 1990 - Biggs terminates Erpenbeck Contract;

8. February 1, 1990 - Erpenbeck option to purchase Vesper property expires without being exercised; and

9. February 6, 1990 - Fiscal Court final action denies Erpenbeck application.

Applicable Law

Erpenbecks and Vespers allege, based on Fiscal Court's denial, Biggs cancelled the agreement with Erpenbeck and, in turn, Erpenbeck cancelled the agreement with Vespers. Clearly, Biggs terminated the Erpenbeck agreement weeks prior to the Fiscal Court action and Erpenbeck's contract with Vespers terminated by its own terms on February 1, 1990. There no longer was a viable application for a Biggs retail center and Erpenbeck had no contractual interest when Fiscal Court acted, and Vespers were not parties to that application. Therefore, Erpenbecks and Vespers are not aggrieved persons by the Fiscal Court's action as required by K.R.S. 100.347 and they are not entitled to relief under that statutory appeal. Further, the appeal presents a moot issue as there can be no practical effect by reversing Fiscal Court's decision. Another factor rendering the appeal moot is Fiscal Court rezoned the previous C-2/PD area to a commercial four zone as part of the county 1991-1992 comprehensive plan and zoning update. This new classification does not allow regional retail development at the intensity proposed for the Biggs retail center. See K.R.S. 100.347; Bourbon Co. Joint Planning v. Simpson, Ky.App., 799 S.W.2d 42 (1990); and Shelby Petroleum v. Croucher, Ky.App., 814 S.W.2d 930 (1991).

These same mootness considerations apply to plaintiff's request for declaratory judgment relief. However, even if not moot, Fiscal Court's decision adopting the Commission's recommendation and its findings are supported by the record. The supporting committee report dated January 3, 1990, comprises nine pages, listing numerous reasons to deny, based on land use impacts, the comprehensive plan, intensity of development, traffic generation, land use incompatibility, and the development extended into the industrial zone. Deference must be afforded governmental administrative regulatory decisions and upheld if substantial, reliable and probative evidence within the record as a whole supports the decision. American Beauty Homes Corp. v. Louisville, Ky., 379 S.W.2d 450 (1964), Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971), and Hocker v. Fisher, Ky.App., 590 S.W.2d 342 (1979).

Here, the record supports the Fiscal Court's decision and the Commission recommendation. To hold otherwise requires approval of a development that conflicts with the comprehensive plan and extends commercial development into an industrial zone. See Carlton v. Taylor, Ky.App., 569 S.W.2d 679 (1978).

Plaintiffs argue Fiscal Court's action constitutes a regulatory compensable taking, as applied or on its face, under federal and state law. They contend the planned development regulations do not advance a legitimate governmental interest, are not authorized under Kentucky law, and prohibit all beneficial or productive use. This Court finds no legal support for these arguments, based on these facts.

The planned development overlay had a C-2 underlying zone, recognizing numerous uses that Erpenbecks or Vespers could pursue. Those regulations did not prohibit or ban submittal of applications for any of these uses. Only the delay associated with the review process was caused by the planned development overlay. PD's process does not amount to a moratorium as plaintiffs urge. Instead, it imposes a regulatory review process based on the comprehensive plan to determine the compatibility, appropriateness and intensity for uses in the underlying zone. Rather than prohibiting all use, these regulations provided a review process under which any of numerous uses may have been approved and, therefore, do not represent a compensable taking. See First English v. Los Angeles Cty., 107 S.Ct. 2378 (1987); Pennell v. City of San Jose, 108 S.Ct. 849 (1988);

Keystone Bituminous Coal v. DeBenedictus, 107 S.Ct. 1232 (1987); and Com., Nat. Resources v. Starns Coal and Lumber, Ky., 678 S.W.2d 378 (1984).

Kentucky law provides broad authority for zoning regulations. K.R.S. 100.201 and .203 recognize as legitimate purposes for zoning those same reasons and land use impacts applied herein as part of the planned development review. These statutes authorize zoning under local governments' police powers to promote public health, safety and general welfare within the planning unit. Facilitating orderly and harmonious development, regulating intensity of land use, preventing overcrowding of land and congestion in the circulation of people are specifically recognized as legitimate governmental purposes for exercising zoning authority. Special zoning districts promoting proper development of planned business or commercial districts and regulating activities and structures on land at or near major thoroughfares, interchanges, transportation arteries, and other places having a special character are expressly authorized. This broad statutory authority has been recognized to include and encourage flexible planned development type regulations. See Tarlock, Kentucky Planning and Land Use Control Enabling Legislation, Etc., 56 Ky. L.J. 556 at 598 (1968).

In Bellemeade Co. v. Priddle, Ky., 503 S.W.2d 734 (1974) similar if not identical regulations were upheld under these statutes. Where regulations promoting these legitimate governmental purposes are consistent with the comprehensive plan, they are a valid exercise of Chapter 100 zoning authority. Moreover, the planned development review process did not apply in all zoning districts. Plaintiffs could have pursued a number of uses under the C-2/PD zone or sought a rezoning to another district without the planned development overlay.

Clearly Article 15 is consistent with and advances recognized legitimate governmental interests of regulating land use. Plaintiffs seek the equivalent of a judicially imposed zone change, without following Chapter 100. This, the Court cannot do. Sladon v. Shawk, Ky.App., 815 S.W.2d 404 (1991) and Louisville v. McDonald, supra. Even if the overlay regulations are invalidated, plaintiffs are not unilaterally entitled to a C-2 zone. Plaintiffs never sought a zone change and a C-2 zone allows development contrary to the comprehensive plan. The Court cannot assume such legislative power.

Instead, the prior industrial zoning would apply and Erpenbecks still would not have been entitled to approval. See Mann v. City of Ft. Thomas, Ky., 437 S.W.2d 209 (1969).

For the same reasons plaintiffs' facial taking argument must be rejected. To prevail, the mere enactment of the overlay regulations in 1986 must show on its face a prohibition of all productive use. Mere delay associated with a regulatory review process that allows some productive use is not a taking on its face. It must be applied to determine whether it will amount to a taking. Agins v. City of Tiburon, 100 S.Ct. 2138 (1980); Penn Central v. City of New York, 98 S.Ct. 2646 (1978); Lucas v. South Carolina Coastal Council, _____ S.Ct. _____ dec'd June 29, 1992; First English, supra; and Pennell, supra. Other property in the immediate vicinity zoned C-2/PD has approved commercial development at a lesser intensity.

Other states applying the Supreme Court's taking analysis reach the same result. Even wetland legislation does not affect a compensable taking where the owner may apply for uses that could be approved under a discretionary approval process. Where property is subject to such a process when the developer contracts to purchase, that developer has no protected investment backed interest or expectation that the approval will be granted. Gil v. Inland Wetlands and Watercourses, 593 A.2d 1368 (Conn. 1991); Namon v. DER, 558 So.2d 504 (Fla. 1990); and Carabell v. DNR, 478 N.W.2d 675 (Mich.App. 1991).

Denial of the most profitable or beneficial use of land is not a constitutional violation of just compensation or substantive due process. Andrus v. Allard, 100 S.Ct. 318 (1979) and Euclid v. Ambler Realty Co., 47 S.Ct. 114 (1926). Judge Bertelsman followed this same principle in a Kentucky case. See Stratford v. State-House, Inc., 542 F.Supp. 1008 (E.D. Ky. 1982).

Plaintiffs additionally cite K.R.S. 446.070 and 522.030 for statutory damages. There is no proof of statutory violations entitling plaintiffs to money damages. Plaintiffs also assert a tort claim for interference with contract relations. There is no proof to support allegations of improper interference by defendants. Further, defendants were engaged in regulatory functions of government of a quasi-judicial nature which does not constitute tortious conduct for which they can be liable in tort. See K.R.S. 65.2003; NCAA v. Hornung, Ky., 754 S.W.2d 8S5 (1988); and Bolden v. City of Covington, Ky., 803 S.W.2d 577 (1991).

Plaintiffs argue the zoning administrator approved the extension of commercial development into the industrial zone. They offer the administrator's October 5, 1989, letter as his ruling. This Court rejects this argument. K.R.S. 100.271 prohibits a zoning administrator from allowing uses that do not conform to the literal terms of the zoning regulations. Only the Fiscal Court can approve uses for areas subject to a PD overlay. The October 5th letter merely informs that the PD review may allow some minimal overlap. Erpenbeck's application was not filed until November and its overlap exceeded 10% mentioned in the informational letter. Cases cited by plaintiffs involve instances where the official had authority to make a decision. Here, the administrator had no authority to approve uses in areas zoned planned development. Another pending matter is Vesper's motion to compel production of documents. The parties have submitted memoranda and the Court has reviewed the documents in-camera. These documents clearly are communications within the attorney-client relationship on legal matters arising from that relationship. This Court has previously held the documents are not subject to inspection under the Open Records Act. Further, the documents are not relevant in themselves, nor calculated to lead to relevant facts. Plaintiff's motion to compel is overruled.

ORDER

Based upon these facts and authorities plaintiffs cannot prevail and Boone Fiscal Court and Boone County Planning Commission are entitled to judgment as a matter of law.

IT IS HEREBY ORDERED AND ADJUDGED that Boone Fiscal Court and Boone County Planning Commission are granted Summary Judgment, dismissing all claims and plaintiffs' appeals.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that plaintiffs motions for declaratory judgment and summary judgment are overruled and denied, with prejudice.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that this is a final and appealable judgment pursuant to Civil Rule 54.02 and there is no just reason for delay. The Clerk is directed to provide notice of entry of this Order pursuant to Rule 77.04.

J. F. Bamberger
JUDGE, BOONE CIRCUIT COURT

Copies to:

Alex F. Talbott
2100 First National Tower
Louisville, Kentucky, 40202

Paul J. Vesper
1005 Madison Avenue
Covington, Kentucky, 41011

David A. Schneider
505 Turfway Ridge Office Park
7300 Turfway Road
Florence, Kentucky, 41042

Larry J. Crigler
6024 Rogers Lane
P.O. Box 169
Burlington, Kentucky, 41005

Dale T. Wilson
7699 Tanners Lane
P.O. Box 756
Florence, Kentucky 41042-0756

BOONE CIRCUIT COURT
CASE NO. 90-CI-174
C/W CASE NO. 90-CI-175

ERPENBECK COMMERCIAL ENTERPRISES, INC.
APPELLANT-PLAINTIFF

v. NOTICE OF APPEAL FROM DECISION OF BOONE COUNTY FISCAL COURT AND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MONETARY DAMAGES

BOONE COUNTY FISCAL COURT, ET AL.
APPELLEE-DEFENDANTS

-and-

ENTERPRISE VI, ET AL. APPELLANT-PLAINTIFFS

v.

BOONE COUNTY FISCAL COURT, ET AL.
APPELLEE-DEFENDANTS

* * * * * * * * *

Comes the Appellant-Plaintiff, Erpenbeck Commercial Enterprises, Inc., by counsel, and for its Amended Complaint, states as follows:

1. Appellants, Dennis J. Vesper, managing partner, and Albert J. Vesper III, guardian for the estate of Alicia Vesper, d/b/a Enterprise VI, a Kentucky general partnership, and Erpenbeck Commercial Enterprises, Inc. were the owners of real estate located in Boone County, Kentucky, on Route 18, which is fully described in Exhibit "A" attached to the original action at the times relevant to this action.

2. Appellants hereby give Notice of Appeal to the Boone Circuit Court from the final decision of the Boone County Fiscal Court, rendered February 6, 1990, adopting the recommendation of

the Boone County Planning Commission denying the utilization of the underlying zone on the property of the Appellants.

3. The Appellants, and each of them, have been injured and aggrieved by the action of the Boone County Fiscal Court and bring this Appeal pursuant to Kentucky Revised Statutes Section 100.347 as interpreted and applied by the Boone County Fiscal Court through its "Zoning Regulations: Boone County, Kentucky" adopted December 1986 (herein "Zoning Order"), Section 230.

4. Appellants appeal the action of the Boone County Fiscal Court as contrary to law and fact in that:

A. The decision of the Boone County Fiscal Court is contrary to and arbitrary based on the evidence presented; or

B. The decision of the Boone County Fiscal Court was arbitrary in that it was not supported by substantial evidence; or

C. The action of the Boone County Fiscal Court denying Appellants' use of their property causes Appellants to be treated differently than other persons similarly situated and inconsistent with the mandates of KRS Section 100.203 requiring uniformity of regulations; or

D. The action of the Boone County Fiscal Court in denying Appellants the use of their property bears no reasonable relationship to the public health, safety, morals, or general welfare of Boone County; or

E. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is unreasonable, arbitrary, and confiscatory and is an absue of its discretion; or

F. The Boone County Fiscal Court's Zoning Order, Article 15, is contrary to, not authorized by and inconsistent with Chapter 100 of the Kentucky Revised Statute; or

G. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is inconsistent with the "Zoning Order" in that:

(i) The Fiscal Court has applied the Zoning Order, Article 15, regulations to Appellants' property although no Concept Development Plan has been proposed or adopted for the subject property by the Boone County Fiscal Court as required by Zoning Order, Section 1502; and/or

(ii) The Boone County Fiscal Court and the Boone County Planning Commission failed to follow the requirements of the Zoning Order, Section 1506, when it failed to make a finding that the proposed use of Appellants' property did not "deviate from standard district regulations"; and/or

(iii) The Boone County Fiscal Court failed to implement and enforce its Zoning Order when the proposed use of the Appellants' property was authorized under the Zoning Order, including Articles 9 and 10.

5. The action of the Boone County Fiscal Court and its Boone County Planning Commission in denying the use of the Appellants' property was a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States prohibition against depriving "any person of life, liberty or property without due process of law" and violative of sections 13 and 242 of the Constitution of the Commonwealth of Kentucky.

WHEREFORE, the Boone Circuit Court is asked to review the actions of the Boone County Fiscal Court and render appropriate orders.

COMPLAINT FOR DECLARATORY JUDGMENT
AND
MONETARY DAMAGES

6. The Plaintiffs incorporate and reallege Paragraphs 1 through 5 hereof and state in more detail as follows:

I. Introduction

7. This action is brought pursuant to Kentucky Revised Statute, Chapter 418, and the Rules of Civil Procedure and seeks a declaration of rights of the Plaintiffs under Kentucky Planning and Zoning Statutes, Kentucky Revised Statute 100.111 et seq. and the "Zoning Order: Boone County, Kentucky," adopted December 1986. Additionally, Plaintiffs seek an award of damages from the Boone County Fiscal Court for inverse condemnation; tortious interference with contractual relations and vested property rights, violations of the United States Constitution, Constitution of Kentucky, federal and state law and in the alternative, against the other Defendants individually.

II. Parties

8. Enterprise VI is a Kentucky general partnership consisting of Albert J. Vesper III, Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper, and Dennis J. Vespers who serves as managing partner. Albert J. Vesper III is guardian for the estate of Alicia Vesper pursuant to an order of the Kenton District Court, Probate Division (herein individually and collectively referred to as "Vesper"). Vesper has been aggrieved and injured by the actions of the Boone County Fiscal Court and the Boone County Planning Commission.

9. Vesper is the owner of a 264 acre parcel of real estate located in Boone County, Kentucky, on Kentucky 18 at Limaburg, Kentucky. The subject of this litigation is a particular 43.45 acre site which is part of the larger tract and described in Exhibit A attached (herein "Zoned Parcel").

10. Erpenbeck Commercial Enterprises, Inc. is a Kentucky corporation engaged in the development of real property (herein "Erpenbeck").

11. The Boone County Fiscal Court (herein "Fiscal Court") is the chief body with legislative power in the county where the Zoned Parcel is located. It has the authority to regulate the zoning in unincorporated areas of Boone County pursuant to Chapter 100 of the Kentucky Revised Statutes (herein "Zoning Enabling Legislation").

12. The Fiscal Court acts through its county commissioners and the county zudge-executive. The Defendants, Bruce Ferguson, Don Davis, Shirley Meihaus, and Irene Patrick, are members of the Boone County Fiscal Court (herein "Fiscal Court Members").

13. The Boone County Planning Commission (herein "Commission") is the planning unit established by the Fiscal Court pursuant to the Zoning Enabling Legislation to perform planning operations for the Fiscal Court and operate as an administrative body of the Fiscal Court in performing those duties. Included within these duties are (i) the making of recommendations to the Fiscal Court under Article 3 of the Zoning Order and (ii) review with recommendation of applications under Article 15 of the Zoning Order.

14. Defendantst Larry Barnett, Fred Burch, Lawrence Collins, R. N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry

Neltner, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith, and William Viox, are members of the Boone County Planning Commission (herein "Commission Members"), who in their capacity as commissioners have taken part in action described in rejecting the use of the Zoned Parcel, all of which have aggrieved and injured Vesper. William Viox is Chairman of the Commission (herein "Chairman") and has authority and acted in such capacity uniquely in relation to the Zoned Parcel.

15. Erpenbeck Commercial Enterprises, Inc. contracted with Vesper to purchase, among other property, the Zoned Parcel. Erpenbeck was the applicant before the Fiscal Court and Commission for utilization of the underlying zone on the Zoned Parcel.

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

III. Statement of Case and Controversy

16. In December of 1986, the Fiscal Court adopted the Zoning Order based upon alleged authority-granted by the Zoning Enabling Legislation.

17. Pursuant to the Zoning Order, the Fiscal Court adopted a Zoning Map for Boone County which indicated that the Zoned Parcel was zoned a combination of "C-2" Commercial District Two and "I-1" Employment District Industrial One. The section of the Zoned Parcel designated "C-2" was overlaid with a "PD" Planned Development special zoning district as defined by Article 15 of the Zoning Order.

18. The "C-2" District is the type of zoning which permits a variety of retail business and office uses without limit to the market area which is serviced including but not limited to: department stores, discount stores and major purchase retail centers. The purpose of "C-2" district is:

> " . . . to provide comparable shopping goods, personal and professional services, and some convenience goods required for normal living needs as well as major purchase opportunities." (Zoning Order, Section 920)

Uses in a "C-2" district include all uses permitted in a "C-1" or "O-1" district. The minimum size of a development in a "C-2" district is two acres with maximum intensity for development over four (4) acres of 18,000 square feet of gross floor space per acre.

19. The "I-1" Employment District Industrial One is a type of zoning which permits small to medium scale transportation, warehouse, light manufacturing and related services. Uses permitted in the district include but are not limited to: wholesale manufacturing, distribution and assemblage of products, and truck terminals. The minimum size of the development is five acres with the maximum intensity not exceeding 25,000 square feet of gross floor space per acre.

20. Pursuant to the Zoning Order, the placement of a "C-2" district (Section 920) and "I-1" district (Section 1030) are located on suitable lands with access to expressways or arterial roads in a regional trade and transportation environment.

21. The "PD" Planned Development is a special overlay zoning district, provided for in the Zoning Order, Article 15, which allows some variety among land uses and densities. Article 15 of the Zoning Order describes the intent of the "PD" district as:

> " . . . to provide a permissive and alternative zoning procedure . . . (for) . . . proposals capable of providing substantial values to the community over the conventional districting and other regulations prescribed as normal course in this order . . ." (Section 1500) (emphasis added)

A "PD" is an overlay zone which means there is always an underlying zone which serves as a reference point to determine principally permitted uses under the standard zoning classification. A "PD" zoning will allow variance of use, design, intensity, size and other features of a development. A "PD" district will allow intensity of uses equal to 150% of use permitted in the underlying district.

(A) Zoning with a "PD" Overlay District.

(i) Pursuant to the Zoning Order, a planned development district overlay may be approved by the Commission and Fiscal Court in the manner provided by Article 15 tsection 1502).

(ii) The procedure for obtaining a "PD" overlay is initiated by the owner of the property to be overlaid with the "PD" designation:

(1) the owner meets with the commission staff, where, among other things, the staff would specify the modifications required of the Concept Development Plan and the applicability of other regulations (Section 1503);
(2) the owner submits a Concept Development Plan (Section 1504);
(3) the Commission conducts a public hearing (Section 1505);
(4) the Commission makes a recommendation on the Concept Development Plan (Section 1506); and
(5) the Fiscal Court acts on the Commission's recommendation (Section 1507) by placing the "PD" overlay, on the owner's property.

This procedure is the only procedure described in Article 15 for the application of a PD to an underlying zone in Boone County.

(B) The Commission's Review of the Concept Development Plan.

In reviewing the Concept Development Plan (step 3 above), the standard that the Commission is required to apply is specified in Zoning Order Section 1506 as:

> " . . . it is consistent with the intent and purpose of this order; whether the proposed development . . . justify the deviation from the standard district regulations." (emphasis added)

22. The Zoned Parcel has never been the subject of an approved Concept Development Plan. Accordingly, pursuant to the Zoning Order, the Zoned Parcel was not subject to the regulations of Article 15.

23. By placing the PD overlay on the Zoned Parcel, without owners' request, the Fiscal Court allowed no permitted uses on the parcel without further legislative action.

24. A parcel with a PD overlay placed upon it at the initiative of the Fiscal Court, cannot obtain a zone permit under Article 14 of the Zoning Ordinance without legislative action by the Fiscal Court.

25. Vesper, by contract, agreed to sell the Zoned Parcel, along with the balance of the tract of land, to Erpenbeck.

26. Erpenbeck contracted to sell to Hyper Shoppes, Inc., dba Bigg's (herein "Bigg's"), the Zoned Parcel for the construction of a retail shopping mall to accommodate a Bigg's discount store (herein "Project").

27. Bigg's had the option to withdraw from the purchase should Erpenbeck be unsuccessful in timely obtaining the necessary permits from Boone County for the construction of the Project.

28. Erpenbeck similarly had the option to withdraw from the contract of purchase and sale with Vesper if Erpenbeck was unsuccessful in obtaining the necessary permits from Boone County for the construction of the Project.

29. Erpenbeck, through its officers and agents, met with the staff of the Commission and explained the details of the Project.

30. The purpose of this meeting and other meetings with the staff of the Commission was for the staff to advise Erpenbeck of any manner in which the Project proposal violated requirements of zoning laws so that modifications, if necessary, could be made or considered before the public hearing.

31. Erpenbeck explained that the Project was or could be modified to be wholly consistent with the underlying zoning on the Zoned Parcel and that to resort to the rezoning or increased densities of the PD overlay (as provided in Article 15 of the Zoning Order) was unnecessary.

32. The staff of the Commission, including the Boone County Zoning Administrator, Jerry Newton, instructed Erpenbeck that no proposal for the Zoned Parcel would be accepted without the filing of a Concept Development Plan as defined by Article 15 of the Zoning Order and KRS Section 100.111(8).

33. At no time prior to the final decision was Erpenbeck advised of any manner in which the Project violated requirements of the underlying "C-2t' or "I-1" zoning or any other zoning regulation.

34. Erpenbeck protested the submission of a Concept Development Plan since the Project was consistent with the underlying zoning on the Zoned Parcel.

35. Based on the Zoning Administrator's interpretation of the Zoning Order, Erpenbeck was incorrectly and needlessly required to submit a Concept Development Plan to the Commission and to undergo the procedures of Article 15 of the Zoning Order.

36. In an effort to mitigate damages, on November 1, 1989, Erpenbeck filed an application affecting the Zoned Property for 'The Utilization of an Underlying Zone in Planned Development' @ with the Commission which clearly disclosed that the uses and intensities of the Project were consistent with the underlying zone and that none of the benefits of a PD Planned Development were requested or required.

37. The Commission scheduled a public hearing for November 29, 1989 on the application at which time the hearing was rescheduled to December 6, 1989 because of the large number of witnesses in attendance.

38. On December 6, 1989, a Public Hearing was conducted by the Commission at the Boone County High School gymnasium where the staff delivered its report and testimony was taken from various witnesses.

39. Although not reflected in the minutes of the Commission meetings, the application of the Erpenbecks was apparently assigned by the Chairman to a committee for review and recommendation. This committee consisted of Barry Neltner, Fred Burch, Rector Jones, Larry Barnett, Carol Smith and Phil Damstrom (who did not appear to participate).

40. The Committee of the Commission filed its report, dated January 30, 1990, and made no findings regarding the Project and its relationship to the underlying zoning nor did the Committee determine whether the Project was a deviation from the standard district regulation.

41. The Committee, in its report, concluded the Project was evaluated from a "land use standpoint" and volunteered the Erpenbeck proposed end-user of the Zoned Parcel (i.e. Bigg's) could find other locations in Boone County.

42. On January 3, 1990, the Commission without comment adopted the report of the Committee and recommended to the Fiscal Court "that the proposed use not be allowed."

43. The Boone Fiscal Court, at its meeting on February 6, 1990, without comment, adopted the final action of the Commission and refused the use of the Zoned Parcel as described in the Project.

44. Based upon the actions of the Fiscal Court, Bigg's has cancelled the contract with Erpenbeck and Erpenbeck has cancelled the contract with Vesper.

IV. Argument

45. Defendants, Fiscal Court and Commission, and the individual Commission Members named herein, in denying the use of the underlying zone on the Zoned Parcel grossly abused their discretion, acted contrary to law, and acted in a manner that bears no reasonable relationship to the public health, safety, morals, or general welfare.

46. The Defendants have adopted procedures inconsistent with the Zoning Order and/or applied the Zoning Order in such a manner as to deny Vesper the reasonable and proper use of the Zoned Parcel. These procedures included but were not limited to:

(a) misapplication of the PD Planned Development Overlay Zone designation; and/or

(b) failure to make findings as required by Section 1506 of the Zoning Order.

47. Vesper had exhausted all available and reasonable administrative remedies and/or appeals, and any other remedies, if any, would be unduly burdensome on Vesper or futile or unreasonable.

48. The restrictions, limitations and procedures imposed by the Defendants upon the use of the Zoned Parcel through the Zoning Order and its interpretation:

(a) bear no reasonable relationship to the public health, safety, morals, or general welfare, and are in excess of the legislative and regulatory power of the Fiscal Court and the Commission; and

(b) are improper, invalid, and contrary to law as applied; and

(c) are unreasonable, arbitrary, and confiscatory, and, therefore, unconstitutional.

49. The actions of the Fiscal Court in adopting Article 15 of the Zoning Order as interpreted by the Commission and the Fiscal Court in its use of PD Overlay Zoning is contrary to and not authorized by the Zoning Enabling Leglslation and is thereby an abuse of the powers of the Fiscal Court, unreasonable and arbitrary.

50. The action of the Fiscal Court and the Commission and its Commission Members in denying the request of the Erpenbecks for use of the Zoned Parcel:

(a) is not supported by substantial evidence, but is clearly erroneous based on reliable, probative, and material evidence in the records;

(b) was based on matters which were irrelevant, immaterial, nonsupportive, and as such, were insufficient for denial, and thereby constituted arbitrary and capricious action on the part of the offending Defendants; and

(c) constitutes a tortious interference with the vested property rights and contractual relations of the Plaintiffs.

51. The rights of Vesper are affected and continue to be affected by the Zoning Order as interpreted and applied by the Fiscal Court, Fiscal Court Members, Commission, and Commission Members in such a manner as to seriously injure and affect the property rights of Vesper, to wit:

(a) Offending Defendants are exercising unconditional and unfettered discretion as to what type of development may occur on the Zoned Parcel; and/or

(b) Offending Defendants are applying and interpreting the various conditions, requirements, and recommendations of the Zoning Order in such a manner to arbitrarily and capriciously deny requests for development of the Zoned Parcel.

52. The Project submitted to the Commission and Fiscal Court by Erpenbeck was, in fact, wholly consistent with the Zoning Order.

V. Relief Sought

Appellant-Plaintiffs demand:

A.) The Court declare the denial of the use of the Zoned Parcel as proposed in the Project by Erpenbeck and the restrictions

and limitations imposed by the Fiscal Court and Commission upon the Zoned Parcel are unreasonable, arbitrary, confiscatory, and not reasonably related to the public health, safety, morals, and general welfare, and therefore, are unconstitutional and invalid;

B.) The Court declare that the placing of the "PD" Planned Development district overlay zoning on the Zoned Parcel was inconsistent with the Zoning Order, and that Article 15 of the Zoning Order has no application to the Zoned Parcel or in the alternative that Article 1S on its face or as applied to the Vesper property is unconstitutional and void;

C.) The Court declare that the findings of the Commission and Fiscal Court in denying the use of the Zoned Parcel as requested by the Project filed by Erpenbeck were not in accord with the mandates of the Zoning Order for review of such Project and thus were null and void;

D.) The Court declare that the Fiscal Court and Commission's action in denying the reasonable use of the Zoned Parcel and/or in not authorizing the reasonable use thereof, constituted a gross abuse of discretion and is contrary to the law; and

E.) The Court declare that the Project proposed by Erpenbeck is a reasonable and proper use of the Zoned Parcel, and therefore, is permitted;

F.) The Court declare that the actions of the Defendants constitute the causes of action hereinafter set out in the Second through the Sixth Causes of Action;

G.) The Court award Plaintiffs the costs of this Court and this litigation and reasonable attorney fees; and

H.) The Court award Plaintiffs all further relief, legal and equitable, to which Plaintiffs may be entitled.

SECOND CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT
(INVERSE CONDEMNATION)

53. The Plaintiffs repeat and reallege the allegations of the previous paragraphs and incorporate same as if written herein.

54. The acts or actions of the Defendants, and each of them, previously referred to herein were the acts taken by agents and employees of the Fiscal Court.

55. All such acts by agents and employees were taken by such agents and employees acting in their official capacities or acting under color of law and in accordance with official policy, custom and practice of the Fiscal Court.

56. This cause being against the Fiscal Court, the funds and property held in the name of Boone County, Kentucky or the Fiscal Court will be subject to execution as a result of any award to Plaintiffs in this action.

57. Under this cause of action, Plaintiffs do not seek an award that would result in subjecting to execution the funds or property held in the names of individual Defendants other than Boone County, Kentucky or its Fiscal Court.

58. The action of the Defendant, Fiscal Court, in denying the use of Plaintiffs' Zoned Parcel was without authority and in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Sections 1(5), 2, 3, 13, 14, 59 and 242 of the Constitution of the Commonwealth of Kentucky.

59. As a result of the unauthorized taking of an interest in Plaintiffs' property, a right has accrued to Plaintiff for recovery from the Defendant, Fiscal Court, of just compensation of the interest taken from the time in which that taking was effected, summer, 1990.

THIRD CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT
(STATUTORY VIOLATION)

60. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

61. The action of the Defendant, Fiscal Court, in adopting, interpreting and/or enforcing the Zoning Order is inconsistent with the provisions of the Zoning Enabling Legislation and has caused Plaintiffs to suffer damages for which recovery is provided under KRS 446.070.

FOURTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT

(INTERFERENCE WITH CONTRACTUAL RELATIONS)

62. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

63. Vesper had agreed to sell the Zoned Parcel and the adjoining tract of land to Erpenbeck and Erpenbeck had agreed to purchase the Zoned Parcel and the adjoining tract of land. Erpenbeck had a further agreement to sell a portion of this property to Bigg's. These contracts were known to the Defendants.

64. As a direct result of the Defendants' refusal to timely allow the use of the Zoned Parcel, Bigg's was forced to cancel its agreement with Erpenbeck and Erpenbeck was forced to cancel the agreement to purchase the Zoned Parcel and the adjoining tract of land.

65. The Defendants have intentionally and improperly engaged in conduct in their official capacity to cause Erpenbeck not to complete this contract. The conduct and acts of the Fiscal Court and its agents were without justification, contrary to legal requirements, and in excess of and an abuse of their authority.

66. As a result, Vesper has lost the benefit of its bargain and Vesper has been damaged in an amount as not yet determined. Erpenbeck has lost the benefits of its bargains with Vesper and Bigg's and has been damaged in an amount not yet determined.

FIFTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT

(42 U.S.C. SECTION 1983 AND SECTION 1988)

67. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

68. The Defendants' actions referred to herein are in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States in that they constitute a taking of Plaintiffs' property without just compensation and a deprivation of Plaintiffs' property without substantive or procedural due process of law.

69. The Defendants' taking and deprivation of Plaintiffs' property caused Plaintiffs substantial loss and damage. Included in such loss and damage are the diminution in the value of the property by the taking, even if deemed temporary with regard to Vesper, and the total destruction of the property with regard to Erpenbeck.

70. Plaintiffs are entitled to recover their loss and damages from the Fiscal Court pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to 42 U.S.C. Section 1983, and their reasonable attorney's fees pursuant to 42 U.S.C. Section 1988.

SIXTH CAUSE OF ACTION IN THE
ALTERNATIVE SEEKING
AN AWARD OF MONETARY DAMAGES FROM THE
FISCAL COURT MEMBERS AND COMMISSION MEMBERS
(ACTION IN THE ALTERNATIVE TO SECOND, THIRD,
FOURTH AND FIFTH CAUSES OF ACTION)

71. Plaintiffs repeat and reallege the allegations of all paragraphs and incorporate same as if written herein.

72. This cause of action is in the alternative to the Second, Third, Fourth and Fifth Causes of Action and only advanced if the Fiscal Court denies the allegations of paragraphs 55 and 56 above, or offers an affirmative defense discharging the Fiscal Court from liability for the acts of the Fiscal Court Members or Commission Members which would not be available to such members.

73. The actions of the Fiscal Court Members and/or Commission Members were taken by such Defendants acting in their official capacities and acting under color of law, but said actions were not taken pursuant to official policy, custom or practice of Boone County, Kentucky or its Fiscal Court.

74. The acts or actions of the Fiscal Court Members or Commission Members were taken negligently or willfully in the real or feigned belief that same were in accordance with the official policy, custom or practice of Boone County, Kentucky or its Fiscal Court or the Commission.

75. The illegality of the Fiscal Court Members or Commission Members' actions is clearly established and such illegality was known or should have been known to them at the time the actions were taken.

76. The Fiscal Court Members or Commission Members are jointly and severally liable to Plaintiffs on the preceding causes of action.

77. Plaintiffs seek a judgment which would subject the funds and property held in the names of Fiscal Court Members or Commission Members to execution.

WHEREFORE, the Plaintiffs demand:

A) Judgment for the Plaintiffs against Boone County Fiscal Court for the loss, damage and expense in an amount as not yet determined but in excess of the minimal jurisdiction of this Court.

B) For interest at the lawful rate from the date of loss, damage or expenses until judgment is paid.

C) In the alternative, judgment against the individual Defendants who are Fiscal Court Members and Commission Members under the Sixth Cause of Action in an amount as not yet determined.

D) Recovery of costs and attorney fees and for all other relief to which they are entitled.

E) For trial by jury on the issues presented in this cause of action.

ALEX F. TALBOTT
KIRK HOSKINS
2100 First National Tower
101 South Fifth Street
Louisville, Kentucky 40202
Phone: (502) 582-1891

THOMAS R. NIENABER
P. O. Box 6910
Florence, Kentucky 41042
Phone: (606) 371-2300

Counsel for Erpenbeck Commercial Enterprises, Inc.

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served upon Dale Wilson, Attorney for Boone County Planning Commission and its Members, 7699 Tanners Lane, Florence, Kentucky 41042; Larry Crigler, Attorney for Boone County Fiscal Court and its Members, 2995 Washington, Burlington, Kentucky 41005; and Paul J. Vesper, Attorney for Vespers, 1005 Madison Avenue, Covington, Kentucky 41011, on this the ~ day of May, 1991, by ordinary United States Mail, first-class, postage prepaid.

ALEX F. TALBOTT

ARTICLE 15

PLANNED DEVELOPMENT (PD)

Section 1500
Intent
The intent of this article is to provide a permissive and alternative zoning procedure for innovative, mixed use residential, commercial, industrial or other type developments or physical design proposals capable of proving substantial value to the community over the conventional districting and other regulations prescribed as normal course in this order but requiring unique consideration, disposition, control and approval. Planned Development (PD) is special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs.

Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

The intensity of use in a Planned Development zone may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zoning district. If building - intensity increased in Planned Development, then the amount of open space (e.g., existing vegetation, buffer areas and new landscape) should increase proportionately.

A planned development may vary the height, use, organization, design, intensity, size or other features of the proposed development. In the case that a specific corridor study has been adopted for an area, intensity and open space recommendations of that study shall apply to specific development sites within the study area. (*See Status of Amendments)

The planned development zone is intended to encourage:

- A maximum choice of living environments by allowing a variety of housing and building types and permitting a reduction in lot dimensions, yards, building setbacks, and area requirements;

- A more useful pattern of open space and recreation areas and, if permitted as part of the project, more convenience in the location of accessory commercial uses and services;

- A development pattern which preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns;

- A more efficient use of land than is generally achieved through conventional development resulting in substantial savings through shorter utilities and streets;

- A development pattern in harmony with land use density, transportation facilities, community facilities, and objectives of the comprehensive plan.

- A signage package in harmony with the objectives of the Planned Development.

Section 1501
Provisions Governing Planned Unit Developments
Because of the special characteristics of planned developments, special provisions governing the development of land for this purpose are required. Whenever there is a conflict or difference between the provisions of this article and those of other articles of this order, the provisions of this article shall prevail. Subjects not covered by this article shall be governed by the respective provisions found elsewhere in this order.

Section 1502
Application and Procedure
Upon approval by the Planning Commission and the legislative body or Fiscal Court, a planned development district may be applied to any other existing district in this order. Upon approval of a concept development plan, the Official Zoning Map shall be annotated for the land area involved so that the district name includes the notation, "PD." Planned development districts shall be approved by the Planning Commission and the legislative body or Fiscal Court in the manner provided in this Article.

For development plans on sites within the Houston-Donaldson Study Area, the recommended Implementation procedure in that study shall be followed. This may result in a development not following the normal Planned Development process if those development plans are consistent with the recommendations of the 'Houston-Donaldson Study'. This shall be determined through a Technical Committee recommendation to the full Planning Commission at the next regular Business Meeting. Decision as to the review process to be followed shall be by simple majority vote. (*See Status of Amendments)

Section 1503
Pre-Application Meeting
The developer shall meet with an appropriate staff person of the Planning Commission prior to the submission of a concept development plan. The purpose of the meeting will be to discuss early and informally the purpose and effect of this order and the criteria and standards which may apply, and to familiarize the developer with the detailed objectives of the comprehensive plan and its elements, this order and this article.

For development plans within the Houston-Donaldson Study Area, a pre-application meeting of the applicant with the Technical Committee of the Planning Commission shall also be held. The purpose of this meeting is to arrive at a recommendation to the full Planning Commission as to whether or not the developer's plans are consistent with the recommendations of the "Houston-Donaldson Study". The Technical Committee meeting may be held immediately prior to a

Business Meeting, and recommendation of the committee may be verbal. (*See Status of Amendment)

Section 1504

Submittal and Contents of Application for Approval of Concept Development Plan

The Planning Commission shall require that a Concept Development Plan be submitted for property located in a Planned Development zone. The Concept Development Plan may be filed to the Planning Commission by the owner(s), owner by contract (option) or lessee of property for which the planned development is proposed. The concept Development Plan shall include the following minimum requirements. The list of other requirements are optional only. With certain type of developments, it may be beneficial to submit a Concept Development Plan that is more detailed or provides more information to the Planning Commission. The list of other requirements are highly recommended for these types of developments and to provide further support for approval of a Concept Development Plan by the Planning Commission. In the case that a specific corridor study is in effect for a site, the optional requirements of a Concept Development Plan are especially important. Any special areas of concern in such a study must also be addressed by the Concept Development Plan. For sites within the Houston-Donaldson Study Area, Design Review and Signage information is required as part of the developer's plan information. (*See Status of Amendments)

Minimum Requirements

1. General Site Characteristics - ownership, geography, soils, drainage, vegetation and other physical characteristics.

2. Transportation Patterns - public and private roads and internal and external circulation patterns.

3. Land Use Characteristics - existing and proposed land uses, structures and buildings (general description of size, area and height).

4. Utilities and Infrastructure

5. Relationship of Proposed Zone Change or Submitted Concept Development Plan with Comprehensive Plan - how specifically the proposed zone change or Submitted Concept Development Plan would conflict, conform complement or otherwise affect the Comprehensive Plan. (see Section 308)

OPTIONAL REQUIREMENTS OF CONCEPT DEVELOPMENT PLAN

1. Include items 1-5 in the previously mentioned list minimum requirements.

2. An area map showing adjacent property owners and existing land uses within 200 feet of the parcel.

3. If the site has unusual or unique natural features, demonstrate how proposed development preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns. If necessary, geotechnical studies should be submitted to indicate soil types, depth of bedrock and slope stability.

4. The location, description and size (acreage) of land uses.

5. Approximate location and number of residential units (if any) along with approximate square footage, density and height.

6. Approximate location and size (square footage) of non-residential buildings.

7. The location of public and private roads, rights-of-way, easements and parking.

8. Calculation of amount of open space both before and after construction. Indicate areas of expected open space and new landscaping. Include maintenance plans for these areas.

9. Where portions of the site are subject to flooding, the Concept Development Plan shall indicate extent and frequency.

10. General location of water, sanitary sewer, telephone, electrical and storm water lines. Capacity levels are recommended.

11. General description of the availability of community facilities such as schools, fire protection services and other types of facilities if any, and how these facilities are affected by this proposal.

12. Preliminary assessment of excavation and fill requirements along with storm water retention and detention plans.

13. Indicate the staging or construction schedule of the project.

14. Submit a detailed traffic study if the proposed development is large-scaled or it the project would significantly alter existing traffic patterns or volume.

15. Submit a sketch or drawing of the proposed buildings to demonstrate the visual appearance or a type of architecture.

The Planning Commission and legislative body or Fiscal Court may recommend or approve the proposed district subject to any conditions or qualifications found merited in the Concept Development Plan or other conditions on the site. The Commission's approval in principle of the Concept Development Plan shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility or other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1505
Public Hearing by Planning Commission
Upon receipt of an application for approval of a concept development plan, the Planning Commission shall hold at least one public hearing, within thirty (30) days of receipt of the application, after notice as required for amendment under Kentucky Revised Statutes, Chapter 424. The following notice, in addition to any other notice required by statute or local regulation or order, shall be given:

1. Notice of the hearing shall be posted conspicuously on the property for which the planned development is proposed at least fourteen (14) days.

2. Notice of the hearing shall be given at least fourteen (14) days in advance of the hearing by registered mail or by certified mail, return receipt requested, to owners of all property adjoining the property for which the planned development is proposed. It shall be the duty of the person or persons proposing the amendment to furnish the names and addresses of the owners of all adjoining property. Records maintained by the Property Valuation Administrator may be relied upon conclusively to determine the identity and address of property owners. (*See Status of Amendments)

3. Notice of the hearing shall be published in a newspaper of general circulation at lest once, but may be published two (2) or more times, provided that one (1) publication occurs not less than seven (7) days prior to the hearing. Said published notice shall state, at a minimum, the time, place and purpose of the hearing.

Section 1506
Approval in Principle by Planning Commission
Within thirty (30) days after the public hearing required by Section 1505, the Planning Commission shall review the concept development plan to determine if it is consistent with the intent and purpose of this order; whether the proposed development advances the general welfare of the community and neighborhood, and whether the benefits, combination of various land uses, innovation of physical design, and

the inter-relationship with the land uses in the surrounding area justify the deviation from standard district regulations. The commission's approval in principle of the concept Development Plan shall be necessary before a Preliminary Development Plan may be approved. Approval in principle shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility of other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1507

Action by Legislative Body or Fiscal Court

After approval of the Concept Development Plan by the Legislative Body or Fiscal Court, or determination by the Planning Commission that the developer's plans are consistent with a specific study that impacts the development site, the developer shall submit a preliminary development plan to the Planning Commission. The preliminary development plan may cover the entire site shown in the concept development plan or a section of said site. The preliminary development plan shall be general conformance with the concept development plan approved in principle. Five (5) copies of the preliminary development plan shall be submitted and must be endorsed by a Professional Engineer, Architect, or Landscape Architect registered in the Commonwealth of Kentucky. (*See Status of Amendments)

Section 1509

Contents of Application for Approval of Preliminary Development Plan

An application for approval of the preliminary development plan shall be filed with the chairperson of the Planning Commission by at least one (1) owner, owner by contract, (option), or lessee of property for which the planned development is proposed. Each application shall be signed by the owner or lessee, attesting to the truth and exactness of all information supplied on the application for preliminary development plan. Each application shall clearly state that the approval shall expire and may be revoked if construction on the project has

not begun within three (3) years from the date of issuance of the approval. The application shall contain the following information:

1. A survey of the proposed development site, showing the dimensions and bearings of the property lines, structures and improvements, area in acres, topography, and other existing features of the development site bearing on the plan including major wooded areas, structures, streets, easements, utility lines, land uses, and the like;

2. All the information required on the Concept Development Plan: the location and sizes of lots, location and proposed density of dwelling units, non-residential building intensity, and land use considered suitable for adjacent properties;

3. A schedule for the development of units to be constructed in progression and a description of the design principles for buildings and streetscapes; tabulation of the number of housing units proposed by type; estimated residential population by type of housing; estimated non-residential population; and standards for height, open space, building density, parting areas, population density and public improvement proposed for each section of the development whenever the applicant proposes an exception from standard zoning districts or other orders governing development;

4. Engineering studies and plans showing, as necessary, water, sewer, drainage, electricity, telephone, and natural gas installation; waste disposal facilities; street improvements, and nature and extent of earthwork required for site preparation and development;

5. A site plan, showing multi-family or nonresidential building(s) or single family residential lots, various functional use areas, circulation, and their relationship;

6. Conceptual or typical landscaping, facade, paving, street furniture and other plans and designs;

7. A description of deed restrictions, protective convenants, and

other legal statements or devices to be used to control the use, development and maintenance of the land, and the improvements thereon, including those areas which are to be commonly owned and maintained.

The approval of the preliminary development plan shall constitute and substitute for the approval of a preliminary subdivision plat as required by the Boone County Subdivision Regulations. The engineering and other information required for the preliminary development plan shall generally be submitted at the same level of accuracy and detail as is required in the Preliminary Subdivision Plat.

Improvement plans and final plats shall be submitted in accordance with the standards and procedures required in the Boone County Subdivision Regulations, or, where no subdivision of land is required in accordance with Article 14, Site Plan Review, of this order.

Section 1510
Decision by Planning Commission

Within sixty (60) days after receipt of the preliminary development plan, the Planning Commission shall approve as presented, approve with supplementary conditions, or disapprove the preliminary development plan, stating the reasons for its action in writing.

Section 1511
Expiration and Extension of Approval Period

The approval of a Preliminary Development Plan for a planned development district shall be for a period not to exceed tow (2) years to allow for preparation and recording of the required subdivision plat the development of the project. If no construction has begun within three (3) years after approval is granted, the approved preliminary development plan may be voided and the land may revert to the district regulations in which it is located when the process for Amendment in Article 3 is followed.

No zoning amendment passed during the time period granted for the

approved preliminary development plan shall in any way affect the terms under which approval of the planned unit development was granted. A one (1) year extension of an approved Preliminary Development Plan may be granted upon request to the Planning Commission.

Section 1514
Permitted Uses
Any uses found to be compatible and of value to the community under the proposal may be combined in planned development districts provided that the proposed location of the uses will not adversely affect adjacent property, and/or the public health, safety, and general welfare and/or the specific objectives of the comprehensive plan.

It is also provided that the amount of land devoted to each use in a planned development shall be specifically determined by the Planning Commission.

Section 1515
Intensity
The intensity of use in a planned development may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zone district.

Section 1516
Minimum Size
The minimum size or area required for a planned development overlay shall be no less than five (5) acres.

Section 1517
Minimum Standards
A planned development and its permitted, accessory and conditional uses, buildings or structures shall be subject to the supplemental, parking and loading, signage regulations of this order, unless superseded by any special requirements, conditions, variances or other particulars imposed by the Planning Commission during the concept or preliminary application and hearing phases described in this article. Such special conditions may include provisions governing project

ownership, common open space lands or facilities, disposition of open land, infrastructure provisions including any physical design and/or any other requirement found to be necessary appropriate or desirable for the purposes of this district.

Such conditions shall be made a part of the terms under which the development is approved. Any violation of such conditions shall be deemed a violation of this order.

Section 1518

Amendments to Concept Development Plan and Preliminary Development Plan

Amendments to the Concept Development Plan involving changes in the development concept, uses, intensity or other elements must be submitted to the Planning Commission and shall conform to the procedure described in Sections 1505-1507. Changes to the Preliminary Development Plan must be submitted to the Director for his approval. The Director shall make a determination that the proposed change does not affect the overall development concept in terms of use, intensity and design, before approving a change. A denial of a proposed change to the preliminary development plan by the Director may refer any proposed change to the preliminary development plan to the Planning Commission for their decision.

Stop the Insanity!

By Lane H. Kendig

The zoning game has long since lost any sense of sportsmanship; it bears a greater resemblance to trench warfare than a game. *See* R. Babcock, *The Zoning Game* (1966). Developers and public planners are both part of the industrial system that builds communities. Planners and local government develop a plan, and developers are the producers of housing, commercial, and industrial buildings. In any system, there will of necessity be some friction. Unfortunately, the current relationship is blatantly adversarial in most communities. Even in communities that are unabashedly pro-growth there is an underlying attempt to extort everything possible from developers, with communities continually upping the demands. In communities with strong no-growth sentiments, the strategy is to delay and attempt to extort totally unrelated concessions in hopes that the developer will go away.

Neither side is without fault. There are bad developers, and there are developments that have created major problems. Tile development community often refuses to work with planners, choosing instead divisive battles on regulations. However, the current insanity is, to a significant extent, the fault of government.

On the municipal side, there is a distrust and often antipathy towards developers without regard to the quality of the proposals. There is an unwillingness to recognize that developers' businesses can be adversely impacted by regulations, just as developers often refuse to acknowledge that improper development increases the cost of governmental services. What is particularly troublesome is the prevalent attitude of government and citizens that there is no need to consider the economic impact that regulations have on developers or large landowners. The result is a general disdain for private property rights. There is often the attitude that the value of existing

---

Lane Kendig is owner of Lane Kendig, Inc., a planning consulting firm in Mundelein, Illinois, and is a pioneer in performance zoning.

homeowners' property rights is to be vigorously protected at the expense of the rights of owners of vacant land.[1] Compounding these problems is the fact that the level and detail of land-use regulations has dramatically increased in recent years. More regulation, more agencies, and conflicting policies all make the process of seeking an approval more cumbersome, costly, and less certain.

The problem has worsened and the antipathy towards developers has become far more pronounced and widespread. Throughout the period of deteriorating relationships, when a landowner went to court to seek redress, the playing field was tilted to favor local government in most states. Even in Illinois, a state that has long had a balancing test, developers face major constraints—time and money. *See La Salle National Bank of Chicago v. County of Cook,* 145 N.E. 2nd 65 (1957), 9 ZD 273.

For developers, litigation is generally a losing proposition, tying up money in a property for years rather than allowing the company to continue making its product. The time and cost can bankrupt a developer. In four decisions—*First English, Nollan, Lucas,* and *Dolan*[2]—the Supreme Court has given the playing field a new tilt. This article is a wake-up call to planners. Unless planners reform their approach to regulation, it is reasonable to expect further action by the courts to remove "the judicial thumb from the government's side of the scale." *See* M. Berger, *Planning Staffs 'Outed' by Lucas Opinion,* 44 Land Use Law & Zoning Digest, No. 9 at 7 (1992).

Worse yet, if planners continue to ignore property rights in their planning, it is likely that legislation will pass in some states that mandates compensation in land-use cases, a factor that has a high probability of inhibiting sound planning.

---

[1]. This is a distillation of a decade of comments, made by planners, citizens, and elected and appointed officials, that the author has heard while representing both local governments and developers.

[2]. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378 (1987), 39 ZD 206, Nollan v. California Coastal Comm'n, 107 S.Ct. 3141 (1987) 39 ZD 226; Lucas v. South Carolina Coastal Council,112 S.Ct.2886 (1992),44 ZD 302; and Dolan v. City of Tigard,114 S.Ct.2309 (1994), 46 ZD 232.

The tilt towards landowners has had a long gestation. The Supreme Court ruled on zoning in 1926 and then largely stayed out of the picture until 1974. *See Village of Belle Terre v. Boraas,* 416 US 1 (1974), 26 ZD 56. It then began a series of cases probing the taking issue with *Agins* in 1980.[3] Zoning was normally considered a legislative act; the challenger had to overcome a presumption of validity in favor of local government. In general, developers faced an uphill battle to challenge local regulations in most states.[4]

In *Ramapo, Petaluma,* and *Penn Central,*[5] the playing field tilted more in favor of government, giving broader scope to planners and local governments. The first cases in which there was a challenge to find a regulatory taking were met with technicalities that seemed to raise new barriers to even getting a decision with the issue of "ripeness."[6] Now we have *First English, Nollan, Lucas,* and *Dolan*—all of which have had the effect of leveling the playing field. The presumption of validity and an unwillingness of the courts to second guess the legislature still remains, but there is now a burden assigned to government to demonstrate a balancing.

---

[3]. Agins v. City of Tiburon, 447 U.S. 255 (1980), 32 ZD 256. Some might use Village of Belle Terre v. Boraas,416 U.S.1 (1974), 26 ZD 56, or Penn Cent. Transp . Co. v. New York City,438 U.S.104 (1978),30 ZD 434, as the starting point.

[4]. The most important exception is Pennsylvania, where the curative amendment process, while time-consuming and costly, provides a direct remedy for the frustrated landowner. In Illinois, there is a balancing test that occasionally gives pause to local regulators.

[5]. Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F. 2d 897 (1975), 27 ZD 527, and Golden v. Town of Ramapo, 285 N.E.2nd 291 (N.Y.1972), appeal dismissed, 409 U.S. 1003 (1972), 24 ZD 99, both provided a new line of regulatory potential for managing and controlling growth. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104,124 (1978) gave a blessing to transferable development rights. This was an exciting time for planners. The courts were providing more tools for addressing urban ills, and it seemed that there was little to fear from severely restricting property rights.

[6]. Agins (1980); San Diego Gas and Electric Co. v. Citv of San Diego, 450 U.S. 621 (1981), 33 ZD 122; and Williamson County Regional Planning Comm'11 v. Hamilton Bank of Iohnson City, 473 U.S. 172 (1985), 37 ZD 286, all required the landowner to exhaust all remedies before the case would be ripe for decision.

Illinois has long had a balancing test applied in zoning cases—the *La Salle* factors.[7] The "essential nexus" seems to call for a strong connection between the public purpose and the means chosen to achieve that purpose. *See Nollan.* Now, *Dolan v. City of Tigard* has provided a "rough proportionality" test. The need for a balancing of interests became clear in *First English;* once a legislative taking and temporary taking were upheld, it did not take a rocket scientist to see that it was only a matter of time before the court took corrective action to level the playing field.

In planning circles, there is general hand-wringing over these four cases. Planners and elected officials seem to fear that the courts are out to strip away the ability to plan. *Use Law & Zoning Digest,* read by many planners, provides commentary on those cases with pro-developer and promunicipality spins on the decisions. (Five discussions of three issues on *Lucas* appeared in 1992 and 1993.) There is discussion about ways to craft regulations that work their way around the decisions. This is unfortunate. What is needed is for planners to recognize that they bear a large responsibility for the current insanity. Planning needs to fundamentally rethink its regulatory approach to account for, not ignore, property rights.

After more than 25 years of planning practice, some important elements become clear. The taking issue provided great encouragement to public agency planners to regulate protection of the environment. *See* F. Ebosselman, D. Callies, and J. Banta, *The Taking Issue (1973).* In the 1960s and 1970s, there were many major issues waiting to be addressed by planners—growth management, agricultural preservation, environmental protection, and housing. *The Taking Issue* emboldened planners to dare address these problems. Encouraged by how difficult it was to prove a taking, planners dared to write zoning ordinances that addressed these important planning issues. The first steps were taken with great concern and considerable care. These efforts succeeded and were upheld by the courts. As a result, confidence increased and many longstanding problems were finally addressed.

---

[7]. La Salle National Bank (1957). La Salle established a series of criteria, including the degree to which the landowner (economically) or municipality (concerning public health, safety, and welfare) was harmed. It also looked at trends of development and the length of time the property had been vacant under the regulations.

As is often the case, the taste of success resulted in an effort to regulate more and more. Unfortunately, less care was taken because planners felt it was difficult to overturn a regulation used to protect the health, safety, and welfare of communities. Abuses resulted. There are cases in which strong regulations with significant impacts are essential to the implementation of an important goal. However, more modest planning objectives need more modest implementation strategies.

As with too many people today, planners can take themselves too seriously. Planners see planning as an absolute "good"[8] that can do no wrong. By inference, any person or group that challenges planning and zoning must be bad. The logic is obviously flawed; like everything else in the world, both planning and development can be either good or bad. An important corollary is that mandatory planning does not alter this premise. There is a great deal of checklist mentality in mandatory planning states. Checklists, such as the ones found in the old Department of Housing and Urban Development 701 Plans, cannot assure good plans.

The profession could continue wringing its hands, in which case adjustments will be made by the legislatures or courts. But now is the time to ask: What are the forces operating within public planning that have led to challenges to local government regulations? What are the solutions?

HOW PLANNING GOT INTO TROUBLE

Aside from the facts in the litigation, there are a number of clear trends in planning that point toward a need for corrections in the way local government regulates land.

---

[8]. Planners are "good guys" unless they recommend something citizens do not want, then they are accused of all varieties of sins. Developers and landowners are often considered "bad guys," the rapers of land who greedily destroy the environment to line their pockets.

Discretionary Zoning

First on the list of what is wrong is the widespread use of discretionary zoning techniques.[9] Discretionary zoning is zoning by negotiation. There are likely to be three different forces involved in a discretionary zoning issue: landowners and developers, public placers and officials, and citizens. Discretionary zoning is the primary source of game playing. Read a book on negotiation. The cardinal rule is always to enter a negotiation with a position from which one may retreat to the position one is willing to accept. This encourages developers to present plans that have problems and are clearly not the best plans. Local government makes unreasonable demands for dedications, improvements, or other "conditions" that are not supported by the community's regulatory standards. Citizens may be interested only in defeating the proposal.

Once people begin playing games in which they have power, they lose sight of the original goals. Government officials are empowered by the conditional use process. This gives officials a chance to make demands that give them power over the landowners and developers. Power often becomes addictive; planners are very vulnerable to this. So long as there is legislative authority for special or conditional uses, the practice spreads. The practice of making unsupported demands is now common in the approval of plats.

For example, a community in Illinois claims to preserve a rural residential character with its five-acre zoning. Its subdivision regulations call for 36-foot-wide concrete streets, plus curbs, sewer, water, and street lights. No existing residential street in the village comes close to meeting these standards. In the midst of litigation,"[10]

---

[9]. Included in this discussion are various land-use control elements outside traditional zoning: the Army Corps of Engineers 404 wetland permits; environmental impact systems such as those in use in California and Oregon; special purpose commissions; architectural review; wetland-coastal commissions common in New England; the California and South Carolina coastal agencies; and the Florida Development Regional Impact (DRI) process. These examples are largely discretionary approvals.

[10]. Korhumel v. County of Lake, Lake County Circuit Court, 1994. The village, through residents, was an intervener.

when it was found during discovery that the regulations would be used against them, the village passed an ordinance indicating that the regulations would not be enforced on the landowners' property. The village used the regulations to require the developer to seek a variance from patently absurd regulations, thus giving the village the right to impose additional conditions. A village manager informed the author that no plan that was higher than three-quarters of the permitted density would be approved.[11] As this illustrates, every success by a community encourages officials to seek more. Developers in Flagstaff, Arizona, said the conditional use process was "like trying to kick a field goal while the other team ran around the end zone with the goal posts." (Source: Author's interviews with various parties in the process of writing a new zoning code.)

The use of discretionary zoning approvals has exploded. Many zoning ordinances contain few, if any, permitted uses. Not surprisingly, this leads to litigation. *Nollan* and *Dolan* both involve discretionary permits. Is the reliance on discretionary permits needed? Planned unit developments (PUDs) can be used as an example. The rationale for PUD ordinances to be discretionary has long passed. If in 1968[12] the planners and courts could all agree that rigid Zoning was too inflexible and PUDs were a solution, is it unreasonable to ask: Why has the profession not replaced rigid Euclidian zoning? The profession is suspect for not having replaced rigid standards with flexible standards. Planning has actually increased its reliance on discretionary approvals over the 26 years since *Cheney*.[13]

---

[11]. Village manager of Mundelein, Illinois. The developer agreed because he wanted to build or sell, not litigate.

[12]. Cheney v. Village 2 at New Hope, Inc., appeal, 429 Pa. 626, 241 A. 2nd 81 (1968),20 Z[) 178. When thiscasewasdecided, the Pennsylvania courts accepted the fact that although no such vehicle was authorized, it was in line with the best plamaing practice, and it struck a balance between better planning and rigid unresponsive regulations.

[13]. In Pennsylvania and Illinois, PUDs were recognized as a valid tool before the legislature got around to providing enabling legislation.

A common purpose statement in PUD ordinances is that the PUD will provide more opportunity to design a flexible development that better responds to unique conditions than standard zoning districts. It is possible to write flexible standards that do not rely on conditional approvals. The continued reliance on conventional (cookie cutter)[14] zoning and discretionary approvals makes one suspect that the purpose is to force developers to negotiate.

There is absolutely no question the conditional process s has led to the assumption that the local government has total discretion in the regulatory environment. Courts in many states have encouraged that assumption by exempting legislative acts from strict scrutiny. The presumption of validity places the burden almost entirely on the landowner to prove that government has erred. While this is an important separation-of-powers issue, it has allowed and even *encouraged* municipalities to ignore the rights of the landowner.

The *Dolan* decision has made the whole concept of conditional zoning perilous. Its discretionary nature invites local government to stretch and reach as did the City of Tigard, resulting in a taking. Discretionary zoning should be applied only to uses that are so controversial that special hearings are a political necessity. Landfills are a good example of such a controversial use. Early on, when a problem is first identified, a conditional review may be necessary. There is even a planning rational for moving away from discretionary approvals—to gain more consistency. Negotiation cannot produce consistency. Negotiation implies that the results of an application are largely unpredictable. Within a couple of years, a solution should be found and zoning revised.

NIMBY Syndrome

Citizens are a major factor in land use. "Not In My Back Yard" (NIMBY) unfortunately describes the concerns of citizens participating in land-use decisions. The NIMBY influence in land-use decision making continues to grow. At one time, this attitude described citizens' reactions to LULUs ("Locally Undesirable Land Uses"),[15]

---

[14]. L. KENDIG, ET AL., PERFORMANCE ZONING (Bucks County Planning Commission,1973).

[15]. F. J. Popper, Siting *LULUS, 47 PLANNING 12* (April 1981).

and it was applied to landfills, group homes, and other uses that anybody would consider controversial. Citizens were willing to acknowledge that there was a regional need for such uses, but they wanted them elsewhere in the community. A sign of the times is that the NIMBY, on reaching maturity, has become a CAVE ("Citizens Against Virtually Everything") person.

The planning profession welcomes citizen participation as a sign of true participatory democracy. However, landowners and developers are citizens, too. A balancing of rights is essential. Citizens should be involved in the plan and ordinance formulation stage, not in areas where the rights of specific landowners are debated in an arena of intense territoriality by neighbors. This also applies to avoiding discretionary approvals. A major way to avoid creating problems is to avoid situations where NIMBYs become involved in adversarial hearings. Pitting one citizen against another is not good democratic planning. There are communities in which nearly every nonresidential use of land requires a discretionary approval. This is unwarranted and a recipe for trouble.

The combination of NIMBYs and requiring discretionary hearings for most uses permits citizens to organize opposition to every development. Landowners subjected to adversarial hearings are vulnerable to continual overreaching by government. The problem is that neighbors are unlikely to want adjoining land developed. Citizens have a negative opinion of developers and large landowners; thus, every application—good or bad—is opposed. They decide that all developments are too dense, lead to congestion, destroy the environment, and/or create a host of other problems.

Ironically, the projects are likely to be similar to the one in which the opponents live. This drawbridge mentality has been around for decades. (Once a family moves in, it is time to pull up the drawbridge and save the land !) However, with urban ills moving into the suburbs and a public increasingly well-educated in planning and zoning matters, it has reached crisis proportions. Now, upon submitting a development plan, a developer immediately faces a request to reduce density. This occurs despite a long recognized finding that one of the biggest ills—urban sprawl—is in part defined by low density. The results adversely impact landowners either by denying a legitimate use of the land or imposing often unwarranted conditions to placate opponents.

Taxes

The tax revolt has exposed the landowner/developer to one more form of blackmail.[16] If local government cannot raise taxes, then a new source of revenue is needed. Who better than the developer? There are well-crafted impact fees that address real problems, yet many more are extortion. In one community, the staff wants residential development to pay for more than 60 percent of village services even though an analysis of revenues indicates that 60 percent of tax revenues come from nonresidential uses. *See* author's tax impact studies in Gurnee, Illinois.

As with all good concepts, impact fees get pushed to the absurd. *Use Land Law & Zoning Digest* published an article about an impact fee for the preservation of rural land.[17] The proposal is a classic governmental attempt to stretch the envelope of regulation. The impact fee requires owners of the little remaining rural land to pay for preserving some of the dwindling supply. The fact is that the homes of existing community residents destroyed most of the rural land they now seek to preserve. This agricultural impact fee transfers the cost of preservation from the people who benefited (by acquiring a house) from the past consumption of farmland and who will benefit by the preservation of the little remaining open space (by having views over open landscape) to the small group of landowners who have preserved land until now. That this occurred in California, home of the tax revolt, is not surprising. This is clearly an example of transferring the cost of broad public benefits to a minority who gains no benefit from the achievement of the goal.

There are still communities in the nation that will install sewer, water, and a variety of public services to developments that will bring jobs. Large employers, such as auto plants (BMW, Saturn), Sears, and others are able to hold off competition, encouraging state and local governments to provide economic development funds

---

[16]. The developer is in business to build things. It takes years to litigate an exaction that is not founded in specific regulatory language. The first reaction of most planning commissions is to ask for something that Will reduce the intensity of use. While planners bemoan urban sprawl, they promote it in nearly every land-use decision.

[17]. A. Mudge, *Protecting Fnn111arld tltrougil Inipact Fees in California, 44* LAND USE L. & ZONIIS . DI(.., No. 1 at 3 January 1992).

(i.e., subsidize development) to keep or gain jobs. Is it fair or equitable for small developments, such as gas stations, hardware stores, or fast food chains to be subjected to a variety of impact fees, arm twisting, or outright extortion when big development is given free improvements? No; clearly it is inequitable.

Time v. Justice

If all the above is true, why are the courts not clogged with zoning litigation? The answer is simple—very few developers can afford to litigate. Developers will settle if it is at all practical. Please note that almost all the recent Supreme Court cases are brought by outraged, rather small landowners. A church, Nollan, Dolan, even Lucas are not developers in the traditional sense. For every lawsuit filed, dozens of individuals cannot afford to bring suit.

Developers cannot by and large tie up their money in years of litigation. The still unresolved *Mayhew v. Sunnyvale,* 774 S.W.2d 284 (Tex. App.1989),42 ZD 252, has been around since 1987. The developers have long since bailed out of the case and left the landowner. Most planners count on the fact that the developers only have an option on the ground, and will cut their losses and seek another property. Another strategy is to outlast the developer, as local government has deep pockets compared to the vast majority of landowners.

The length of time it takes to get a local government decision reversed is a major deterrent to the landowner. Pennsylvania's curative amendment process is one of the more streamlined processes. In theory, a landowner challenges the ordinance. The local government holds a hearing and makes a decision to alter its regulations or stand by them. The developer may appeal the decision to the courts, and the appeal is on the record made at the curative amendment hearings. But, even this process can be dragged out. Local governments consist of part-time officials who often meet only once a month. It can take six months or more just to hold the hearings. The costs can easily mount to the point where many developers cannot afford to challenge. It is, however, less costly than an entire trial at which—despite public hearings—discovery and legal maneuvers can chew up hundreds of thousands of dollars and years of time. Few landowners can sustain the cost of litigation; this permits government to ignore the rights of all but the most determined.

The whole notion of ripeness is another pitfall. The municipal staff gets paid no matter how many applications are made. How much should a developer have to throw away in fees, professional experts, interest, or option costs? Failure to ask for a variance, whose procedures are clearly delineated, is a legitimate ripeness issue. However, the community whose plan and ordinances will not permit the use should not be able to require a developer to make fruitless and costly applications. In all discretionary situations, a local government can approve a plan w ith conditions. Justice requires fairness and responsibility on the part of local government.

If a developer asks for 500 dwellings in a planned development or conditional use application, a community could approve the plan on the condition that it be reduced to 320 dwellings. The developer can accept this or go to court. This would result in a set of known conditions to be evaluated by the courts. It is unfair and inequitable to ask a developer to revise the plan downward without explicit guidance, in hopes he can find the point at which the local government will find the plan suitable. Equal protection should require zoning to be clearly written so that a professional can submit a plan that meets the code. Ripeness in discretionary proceedings is akin to Russian roulette.

Planning Is Good In some respects, planners get a missionary complex. Planning is "good," thus anybody who disagrees with planning is by definition the "bad" heathen. In part, this is what underlies the battles between planners and developers or landowners. It is not uncommon to hear professional planners lump all developers in the "rapist of the land" category. This is a distortion of reality. "Good" and "bad" are terms that can be used equally to describe municipal land-use plans or developers' plans. It is also critical to distinguish between arguments over the general desire to protect the public and the specific means used. Too many planners accept the "ends justifies the means" approach.

It has been stressed that planning is a process. Many state regulations, including those of Florida, California, and Oregon, set forth fairly detailed planning criteria. But the fact that a community has gone through the process and gained state approval does not make a plan a good one. A quality plan is one that, if implemented, will

actually lead to the achievement of the desired goals. Unfortunately, implementation carries costs. There are two basic means of implementing a goal: spend government (public) money, or regulate (pass the cost on to others). The tests imposed by the Supreme Court should not be viewed as anti-planning. They have asked planners to use implementation strategies that achieve the goal (essential nexus) and balance the public good against the damage to the landowner (rough proportionality).

The fact that private goals conflict with some planning goals does not mean the private goals are bad. Many comprehensive plans have conflicting goals. For example, most growth management plans place stress on housing costs, which adversely affects the affordable housing goal. That does not mean growth management is bad. Similarly, landowners' protests that they are being asked to bear too great a burden should be taken as a public concern. If government feels no obligation to seek a balancing of conflicting public and private interests, then it clearly forfeits its legislative role of finding a balance. Since this is the mantle that confers the "presumption of validity," government must take seriously its responsibility to seek a balance. In doing so, planners must develop a strong ability to be critical of their own work.

Many planners are not looking seriously at the critical issue of balancing public interests and landowner rights, but rather are worried about losing the ability to operate unfettered by consideration of the landowners' rights.

Planners can begin their refocusing by understanding that there are numerous bad plans and by not instinctively supporting all plans. Planners often rationalize bad planning because they think of planning as a process. The rationalization goes something like this: "Planning is good; planning should listen to people; therefore, the result of a planning process is good." This rationalization is dangerous, because it attempts to justify ignoring landowners' rights. A good plan would demonstrate a sensitivity to a landowner's rights in selecting the implementation process and how closely it fits with public purposes.

REINVENTING PLANNING REGULATIONS

It seems evident that the courts are moving to restore a balance be-

tween the achievement of laudable public goals through various regulatory systems and private property rights. The opinions presented in *Lucas* and *Dolan* make clear that the majority of the Court is trying to swing the pendulum back to a more even balance.[18] Planners fear the pendulum will swing too far, destroying the ability to plan. (For example, in footnote 7 at 2894 of *Lucas*, Justice Scalia strongly indicates a willingness to entertain a partial taking.)

How does one restore the balance without destroying the ability of local government to implement its planning functions? The answer lies firmly in the planner's grasp. The profession must clearly reassess how it goes about writing regulations. The following guidelines set forth the elements that must be built into regulations to ensure private rights are not trampled:

• A *balancing* of public and private interests should become a fundamental step done by planners in drafting regulations.

• Because there are normally a number of regulatory options, the one selected by local government should be that which best achieves the governmental objective with the *minimum disruption* to property values.

• Numerous market forces impact a landowner. Regulations need to provide flexibility for the landowner to adapt.

• Certainty for all landowners, neighbors, and the public is critical. Uncertainty or a lack of clear standards creates the potential for abuse. Each group has different needs w ith respect to certainty that should be studied when developing regulations.

• Wherever possible, standards should be *quantifiable*. General statements of principles that require interpretation to determine if the standard is met are undesirable.

---

[18]. Justice Blackmun, in Lucas, indicated his fear that the Court's new policy will spread beyond the narrow confines of the present case. Dissenting opinion, at 2904. In Dolan, Justice Stevens considered the decision to "break considerable and unpropitious new ground." Dissenting opinion at 2322.

• Care needs to be taken to *streamline approvals* by eliminating time-consuming and overlapping approvals.

• Governments should be cautious in pushing the envelope of public regulations to expand their scope or shift costs to landowners.

Reinventing planning using these guidelines is easier than one would think. The Supreme Court has already laid out two major tests: rational nexus (see *Nollan)* and rough proportionality *(see Dolan).* The first two guidelines suggest how a local government might plan to avoid running afoul of these tests. The remaining guidelines suggest ways in which the planner may seek to address concerns of the landowner, public, and staff. Admittedly, they seem more oriented towards the landowner. The reason is simple; in cases in which the courts have had to weigh the concerns of the landowner, there is no lack of understanding of the general public purpose. The underlying, or at least the declared, purposes of the regulations have all been valid public objectives.[19] In every case, options existed that might have better or equally achieved the goals.[20] Thus, the issue is not whether planning and zoning would be hamstrung; the issue is educating planners to select the options that respect private rights while achieving the same objectives.

Balancing

The rationale for deferring to the legislative branch is that legislative decisions are supposed to balance competing interests. While there are numerous examples of carefully considered regulations that sought

---

[19]. In Nollan, it is arguable that the California Coastal Commission's real objective was not the declared visual access to the ocean but, rather, the right of public access to the beach.

[20]. In Nollan, clearly bulk and setback requirements could have addressed the view issue. In Lucas, a variance procedure would have avoided the problem. Lastly, in Dolan, every city objective could have been achieved by the use of standards for building and detention. While nobody questions the value of bicycle and pedestrian ways, it is clear to most rational observers that hardware/building supply sales is not a use that is likely to attract many bicycle riders or pedestrians.

to balance public goals with private rights, it is clear that in many communities this is a foreign concept.

Balancing is easy. The first step is to evaluate the public gain versus the private imposition. Illinois has long employed this test.[21] For planners, the gain to the public can be measured by health, safety, and general welfare. Turning to environmental protection, the highest level is protecting the public from being exposed to conditions that can threaten people or buildings. A more generic purpose, such as aesthetics, which may advance the public welfare, should not result in the same level of impact on land values as does a regulation that protects the public from health or safety risks. Planners should be able to prioritize the level of impact and gain.

For example, regulations designed to prohibit development that might lead to damage such as occurred along the Mississippi and Missouri rivers in 1993 or in Georgia in 1994 are intrinsically more important than regulations whose sole purpose is aesthetics. In flooding, there is loss of life, economic loss to families and whole communities, and loss to the taxpayers of the whole nation.[22] A landowner clearly has little right to profit if the profit carries a high risk to the users of the property. On the other hand, aesthetic regulations should not impose a large proportional burden on a use, if the aesthetic treatment of the use will accrue value to the community as a whole.

Minimum Damages to Property Rights

Normally local government may chose its implementation strategy from a number of regulatory options. Given a series of options, the local government is obligated either to select one that best achieves the governmental objective with the minimum disruption to property values or to give the landowner a clear choice. In *Dolan*, a number of techniques were available to the City of Tigard to control flooding and stormwater. The city had to prohibit building in the floodplain to

---

[21]. *Same* La Salle (1957). One of the factors to consider in determining an ordinance's validity is "the relativegain to the public as compared to the hardship imposed upon the individual property owner."

[22]. In 1991, total damages paid by National Flood Insurance Programs were $2,524,502,816. FEMA expenses were $166,398,675. Source: FEMA.

obtain flood insurance. The city could have required each landowner to provide stormwater detention which, in combination, would have accomplished the goal. If a citywide solution were desired, a special taxing district could have been created to spread the cost among all who benefited. The city chose to go for the most damaging—land dedication to the city.

Selecting the alternative is not a difficult task. In most cases in which the environment is concerned, a single concept—clustering—will do the job. For example, floodplains, wetlands, forests, and steep slopes can usually be preserved while still permitting densities close to that which would normally be permitted on sites without such resources. If clustering is provided and development achieves the zoned density, no taking occurs.[23] The important factor is always seek the best possible balance for the environment *and* the landowner.

The impact on individual parcels should be considered as well. Planners can easily assess the impact by overlaying parcel maps with protection areas. If very small parcels fall entirely within the protected area, a special strategy will need to be adopted that recognizes the unique impact on these property owners.

Flexibility

Conventional zoning is very rigid. The market to which developers must respond is dynamic. Gaining approval for a project now takes months or, in some jurisdictions, years. The numerous market forces that impact a landowner are beyond the control of both the developer and local government. One thing that government could do, which would greatly benefit landowners, is to make regulations more flexible as a matter of right. The ability to respond to changing market conditions without lengthy hearings and high costs would increase the value of land without any change in the permitted densities. It would also contribute to achieving an important planning goal—encouraging a broader mix of housing.

Note that flexibility must be a matter of right. Planned unit developments are often considered a form of flexible zoning. Unfor-

---

[23]. A note of caution is needed: Environments exist in which the topography or resources sharply restricts very large areas. More extreme forms of clustering maybe needed and gross densities may also need to be reduced.

tunately, they bind the developer to a site-specific plan. Changing the plan in response to changing market conditions is fraught with difficulties, particularly if the market were to favor less-expensive units. The flexibility must be a matter of right, so that all that is required to shift direction would be meeting the subdivision standards.

Certainty

Certainty is the holy grail of zoning. Certainty is desired by the landowner, neighbors, and government. Neighborhood residents want certainty that the character of their community will not be destroyed as the area grows. The landowner would like the certainty of a reasonable use of the land when that land is marketed. Lastly, government has planning objectives it would like to be certain of achieving. The problem is in providing zoning that achieves this all-around certainty.

Conventional zoning, in effect, requires the local government to chose who wins and who loses. Conventional Euclidian zoning with land use and lot size rigidly segregated by district fails to meet the needs of the development community or landowner. The reality of the market is that prospective developers seek the best site on the market, not the best site. In a rigid system, there is a high probability of a mismatch between the purchaser's needs and the zoning.[24] Thus, the need to change the zoning fails to provide certainty for the developer. A change of zoning implies a change in character and a failure to provide certainty for the neighbors as well.

Conventional land-use and lot size regulations rarely relate to environmental or other specific purposes that zoning is increasingly expected to protect. Because it does not relate to these objectives, it cannot provide certainty for important public objectives. The structure of conventional zoning also provides a mismatch between the objective and the means of achieving it.

Negotiated or discretionary zoning processes are, by definition, uncertain. These regulations encourage game playing by all three parties—developer, citizen, and government. Negotiation must result in uncertainty for all three parties. The rules of sound negotia-

---

[24]. In Lake County, Illinois, a parcel was rezoned back and forth three times as the landowner sought a purchaser in the midst of a shifting market.

tion encourage abuse. Government officials who learn to play the game well seek to exact ever-increasing commitments from the landowner without any rules. It is no surprise that *Nollan* and *Dolan* both came from the application of discretionary zoning. In playing the development game, it is too easy to lose sight of basic objectives and become consumed by the game. The objective becomes winning more and more concessions—creating more and more uncertainty for landowners and developers.

Quantifiable Standards

Wherever possible, standards should be quantifiable and measurable. (general or vague statements of principles such as "protect the environment to the maximum degree possible"[25] are wide open to interpretation. This violates the objective of certainty. Because there is no quantification, individual judgment is encouraged. It is possible to develop a series of principles or tests that no development can actually meet, but this invites abuse. *See* Zoning Regulations, Teton County, Wyoming. Zoning is easily adapted to quantifiable measures. Once a measurable standard is set, there is no question as to its meaning. A maximum density of three dwelling units per acre does not mean 3.25.

Selecting measurable standards to achieve specific goals has a beneficial side effect. The analysis leading Up to selecting a standard requires the local government to demonstrate that the standard selected has a rational nexus with a public purpose or goal. It also quantifies the impact on the landowner. Quantification thus assists the government in examining the regulation to see if it meets both the nexus and proportionality tests.

Timely and Definitive Approvals

Well-written regulations can benefit the development community with no adverse impact on any legitimate objective of the public. Time is money to developers. A process that has measurable standards and flexibility as a matter of right will result in rapid and certain approvals. This increases profits. Care needs to be taken to eliminate time-

---

[25]. This is a paraphrase of language often found in planned development or conditional zoning regulations.

consuming and overlapping approval processes. Unfortunately, the planning profession and elected officials have tended to increase the number of bodies that must rule on a development approval.

Certainty is meaningless if you get a certain zoning density that is modified by an environmental or appearance commission. The development community is stressed in King County, Washington, by a new regulatory approach, Quality Urban Environment (QUE) and the survival of the State Environmental Protection Act (SEPA). Given the county's objective to concentrate development to achieve a variety of goals, the county finds that it, too, can be frustrated by overlapping regulations. *See* D. R. Porter, *No Easy Answers in King County, Washington*, 53 Urban Land 29 (July 1994).

The frosting on the cake is the cost and uncertainty of the discretionary process. It reaches the heights of absurdity in some environmental areas, most notably wetlands. The U.S. Army Corps of Engineers routinely is months behind in approving projects. A large number of the reviews are completely discretionary, up to the biases of a low-level employee who has nearly absolute discretion. This discretion is often wielded with a heavy hand by individuals who believe developers are bad people who make too much money.[26]

Again, time is money to developers. Faced with mounting bills for planners and lawyers, many developers or landowners are forced to cave in to regulations or conditions that violate their rights simply so they can get on with business. The costs of carrying the acquisition of the land, as well as the cost of lost opportunities to make money on the investment, become unbearable, and concessions are made to end the frustration of the discretionary process.

Pushing the Envelope

It is essential that local government occasionally push the regulatory envelope to achieve a better level of planning. A certain amount of exploration is good for planning and the law. A great many important community goals would not have been met if planners did not push their clients' interests. The vast majority of municipal plans

---

[26]. This observation comes from conversations with Corps of Engineer employees and many planners. It is not uncommon to find a lack of concern for private property rights among these professionals.

have no intent to break new ground. Unfortunately, municipal governments are routinely pushing the envelope, either by seeking to expand the scope of regulations or by shifting traditional public costs to a small group of landowners. In a complex society and environment, there is a need to explore ways of solving new problems that do not always include pushing the envelope. When radical or costly regulations are forced on ordinary everyday uses, there is a reason for concern.

While there will always be zoning battles and litigation, the current situation is generally out of control. The battles have been going on so long that in nearly every case planners and developers line up on opposite sides regardless of merit of the case or proposal. Mindless choosing of sides is a sign of a polarized noncommunicative system. This represents an unhealthy condition.

PERFORMANCE-ORIENTED PLANNING AND ZONING

As it turns out, there is no need to completely reinvent planning and zoning. All seven of the previously enumerated goals may be achieved by using performance zoning. Since the early 1970s, performance zoning has been working and tested in numerous jurisdictions. The planning profession[27] has had ample exposure to it. Performance zoning requires the local government to identify planning goals and then write regulations that specifically achieve these goals. This forces the community to go through its own process of assuring that there is a rational nexus between its regulations (public purposes) and what is required of the developers (mitigations of development impacts).

From its inception in Bucks County, Pennsylvania, performance zoning has been designed to seek a balance. It provides more choice in land development options, greater flexibility in design, certainty, and speedy processing for the developer. While respecting property rights, it has been successful in achieving difficult objectives such as protection of natural resources, enhancement of water quality, preservation of community character, and effective allocation of scarce governmental resources to support new development.

---

27. L. KENDIG, PERFORMANCE ZONING (Bucks County Planning Commission,1973), and L. KENDIG, PERFORMANCE ZONING (PjannerS Press,1980).

Since performance zoning has always included the notion of balancing, it meets the public purpose and rough proportionality criteria.

In developing the performance zoning system, there was a conscious effort to ensure that the selected option would meet the governmental goal while giving the landowner sufficient flexibility. For example, consider buffering neighboring land uses from a new use. Instead of specifying a single buffer, the model ordinance provided a range of options from which the landowner could choose. Since 1980, it has been possible to develop pure performance standards that permit nearly infinite flexibility. The Public is given certainty of protection from uses of a given intensity, and the developer has both certainty and flexibility A wide range of land uses is permitted, and trade-offs (plant material for land) can be made so that the developer can select the option that best meets the parcel's situation. Thus, performance standards meet the "least restrictive" criteria and the "flexibility" criteria. An ordinance designed with this in mind will more than likely meet the "rough proportionality" test.

Performance zoning seeks to make the vast majority of land uses permitted uses in the district, minimizing the use of discretionary approvals. The broader the list of permitted uses, the greater the certainty the landowner has of being able to market the property. Certainty for neighbors is provided by a variety of performance standards, each designed to address a land-use problem. Buffer yards protect neighbors in different zoning categories and screen parking and other uses that have intrinsic adverse impacts on residential properties. Performance standards control light and glare and other emissions from a site. Environmental standards that set levels of protection for natural resources guard against destruction of a community's resource base, while other performance standards address runoff, pollution, and mitigation.

Being certain that a municipality's community character will be protected is among the most critical issues for neighbors. Citizens appearing at zoning hearings are uniformly concerned with erosion of community character by the proposed use. Performance zoning is based on a system of community character analysis that quantifies the critical elements that make up an area's community character. These are translated into performance standards so that no matter what the land use, it must be built to achieve the character of district.

A gas station or fast food restaurant can be designed to have the character of a highway strip or the character of a suburban residential neighborhood.

Certainty is, by definition, impossible in discretionary approvals, because discretion means that ad hoc decisions will be made. The use of performance standards provides both flexibility and certainty. Providing certainty for government or neighbors requires the planner first to identify specifically what elements of a land use create a public health, safety, or welfare problem. Once the problem is identified, a performance standard is specified to provide the requisite protection. The process thus requires that a rational nexus be built into the regulation. Because a narrow focus is used, it is possible to use standards that achieve the objective without secondary adverse consequences.

Thus, performance standards quantify goal or policy statements by their very nature. Many discretionary conditional use or planned development regulations substitute policy statements for performance standards. An evaluation that calls for ensuring the protection of health, safety, and welfare is, in reality, a policy that calls for a board to render an ad hoc determination of whether the policy is met. A performance standard that relates land area needed for on-site waste disposal based on soil conditions is a performance standard whose relationship to the public health is clear. The quantification means that precise yes or no determinations can be made by a variety of people. The lot either has the minimum area or it does not; no discretion is involved. More than 20 years of experience with performance zoning indicates that performance standards can be developed for nearly all uses and areas of legitimate public concern.

In addition, performance zoning deals well with balancing landowner interests with legitimate needs to push the envelope of regulations. Performance zoning has always had to confront serious planning issues often pushing the envelope of regulations. In the early 1970s, it comprehensively addressed resource protection and growth management. The use of clustering and broader use options permitted pushing the regulatory envelope into new areas without placing the burden unfairly on the landowner. In Lake County, Illinois, it was shown that by permitting clustering as a matter of right, strict resource protection would not adversely affect the average density yield of development.

Caution is required whenever a planner begins pushing the envelope. The balancing philosophy of performance zoning is intended to eliminate the problem to the maximum degree possible. It certainly would have eliminated the underlying problems in *Nollan, Dolan,* and *Lucas.*

CONCLUSION

Fears abound that the Supreme Court decisions in *Nollan, Lucas,* and *Dolan* represent a threat to sound high-quality planning. There are those who fear these decisions threaten the ability of local government to deal with complex issues through the use of regulations. The threat is largely one of government's making. What is threatened is the view that government need be concerned only with the achievement of public policy objectives, and can and should ignore the rights of landowners.

If local government acts on the premise "that government is not concerned with the landowners' (developers') economics,"[28] then it risks trouble. It does not take much for that statement to become "government is not concerned with private property rights." Once the planners who write the plans and regulations understand that governmental objectives must be balanced against the impact on property rights, the threat of legal problems will decline greatly.

Compared with conventional zoning and discretionary approvals, performance zoning is a well-tested alternative that provides better protection and more certainty. Performance zoning has the added advantage of being based on the detailed study of problems; it uses standards that specifically address the problems in a manner that can easily meet the tests identified by the U.S. Supreme Court.

Planners can sit idly by and wait to see how far the pendulum will swing, or the profession can use performance zoning to rapidly reinvent the manner in which government regulates the use of land. A conservative reading of *Lucas* indicates that some members of the Court are willing to entertain a case that seeks partial damages

---

[28]. This is a premise the author has heard voiced by planners and local officials both publicly and privately.

for regulations that are so severe that they approach a taking.[29] If local governments continue to fail to strike a balance between the achievement of goals through regulations and the impact of the regulations, such a case may not be too far around the corner.

On the other hand, that case can be avoided if government does a good job of balancing. In all three cases, government was overreaching. In *Nollan,* it was pure greed seeking something unrelated to the public purpose. In *Lucas,* poor drafting allowed the case to go to court in the first place. In *Dolan,* there was a failure to balance. All the goals except public access could have been achieved through the use of performance standards. Access unrelated to the use of the site dictates acquisition. If planners and elected officials recognize and develop regulations in which a balance is clearly presented, then there is nothing to fear.

---

[29]. Justice Scalia said: "This analysis errd in its assumption that the landowner whose deprivation is one step short of complete is notentitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." Lucas, footnote 8 at 2895.

Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

Nos. 94-1494 and 94-1516

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-1494

ERPENBECK COMMERCIAL ENTERPRISES, INC.,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

No. 94-1516

ENTERPRISE VI, *et al.*,

Petitioners,

v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

LARRY J. CRIGLER
6024 Rogers Lane
P.O. Box 169
Burlington, Kentucky 41005
(606) 586-9950
Counsel for Respondent,
Boone County
Fiscal Court.

DALE T. WILSON
ROUSE, SKEES, WILSON & DILLON
7699 Ewing Boulevard
P.O. Box 756
Florence, Kentucky 41042
(606) 371-7407
Counsel for Respondent,
Boone County
Planning Commission.

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTIONS PRESENTED

I. Do Petitioners have a protected property interest in the only zoning application denied to support a Fifth Amendment taking and a Fourteenth Amendment due process claim pursuant to 42 U.S.C. §1983.

II. If so, do Respondents' actions constitute a Fifth Amendment taking and Fourteenth Amendment due process violation of that property interest.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTORY PROVISIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING PETITION 10

ARGUMENT:

I. Petitioners Lack A Protected Property Interest In The Only Zoning Application Denied To Support A Fifth Amendment Taking And A Fourteenth Amendment Due Process Claim Under 42 U.S.C. §1983 11

II. Respondents' Actions Do Not Constitute A Fifth Amendment Taking Or Fourteenth Amendment Due Process Violation 14

CONCLUSION 20

APPENDICES:

Appendix A – Letter Dated November 6, 1989 . . . . . 1a

Appendix B – Real Estate Purchase Agreement With Hyper 3a

Appendix C – Deed To Waco Oil Company, Inc. 27a

Appendix D – Boone County Planning Commission Minutes Dated January 18, 1995 . . . . . 31a

Appendix E – Boone County Planning Commission Report Dated January 3, 1990 . . . . . 38a

Appendix F – Boone County Planning Commission Committee Report Of October 3, 1990 . . . . . 53a

Appendix G – Affidavit Of Mike Phillips 61a

Appendix H – Boone Circuit Court Order Overruling Motion To Alter, Amend and Vacate 67a

TABLE OF AUTHORITIES

Page

Cases:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 12, 14, 18

Anderson v. City of Issaquah, 851 P.2d 744 (Wash. App. 1993) 17

Bellemeade Co. v. Priddle, Ky., 503 S.W.2d 734 (1974). 15

Board of Regents v. Roth, 408 U.S. 564 (1972) 11, 17

City of Buford v. Ward, 443 S.E.2d 279 (Ga. 1994) 16

Collard v. Kentucky Bd. of Nursing, 896 F.2d 179 (6th Cir. 1990) 19

Comnty. Conc. Citizens v. Union Twp., 613 N.E.2d 580 (Oh. 1993). 13

Connally v. General Const. Co., 269 U.S. 385 (1926) 18

Danville-Boyle County v. Prall, Ky., 840 S.W.2d 205 (1992). 15

Dodd v. Hood River County, 855 P.2d 608 (Or. 1993) 13

Dolan v. City of Tigard, ___ U.S. ___, 114 S.Ct. 2309 (1994). 16

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). 11, 14

First English Evan. Luth. Ch. v. Los Angeles Cty., 482 U.S. 304 (1987) 12, 13, 18

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 18

Grayned v. City of Rockford, 408 U.S. 104 (1972) 17

Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 193 (1994) 13, 14, 18

Kelly v. TRPA, 855 P.2d 1027 (Nev. 1993), *cert. denied*, 114 S.Ct. 684 (1994). 13

Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987) 12

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886 (1992) 13, 18

Cases, continued: Page

National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1197 (1992) 20

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 11

New Motor Vehicle Board of Ca. v. Orrin W. Fox Co., 439 U.S. 96 (1978) 16

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 12

Pennell v. City of San Jose, 485 U.S. 1 (1988) 12

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 11

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 14

RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911 (2nd Cir. 1989) 14, 15

Silver v. Franklin Tp. Board of Zoning Appeals, 966 F.2d 1031 (6th Cir. 1992) 13

Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989) 14

Standard Mining and Development Corp. v. City of Auburn, Wash., 510 P.2d 647 (1973) 17

Tabb Lakes Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) 18

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 12, 18, 19

Ward v. Harding, Ky., 860 S.W.2d 280 (1993) 13

Wheeler v. City of Wayzata, 511 N.W.2d 39 (Minn. 1994) 13

Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172 (1985) 19

Wilson v. Garcia, 471 U.S. 261 (1985) 19

Statutes:

Page

42 U.S.C. §1983 . . . . . 10, 11, 19
Kentucky Revised Statutes, Chapter 100 15
K.R.S. 100.201 15
K.R.S. 100.203(1) 15
K.R.S. 100.203(1)(e) 15
K.R.S. 100.347 17
K.R.S. 413.140(1)(a) 19

Ordinance:

Boone County Zoning Regulation, Article 15,
Section 1500 . . . . . 7, 8
Section 1504 7
Section 1506 7
Section 1514 3

Nos. 94-1494 and 94-1516

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-1494

ERPENBECK COMMERCIAL ENTERPRISES, INC.,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

No. 94-1516

ENTERPRISE VI, *et al.*,

Petitioners,

v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured and in an action at law, suit in equity, or other proper proceeding for redress.

Article 15 of the Boone County Zoning Regulations appearing in Petitioner, Erpenbeck Commercial Enterprises, Inc., Appendix, 53.

COUNTERSTATEMENT OF THE CASE

Petitioners, Erpenbeck Commercial Enterprises, Inc., (Erpenbeck) and Enterprise VI (Vesper), omit and misrepresent key facts supporting the Boone Circuit Court and Court of Appeals of Kentucky decisions. These undisputed facts which demonstrate federal questions and law were decided consistent with decisions of this Court. Nor is an unsettled question of federal law presented.

Petitioners had no constitutional protected right to the only zoning approval denied and the C-2/PD zoning classification does not violate the Constitution. Petitioners assert the same arguments as their prior Petition for a Writ of Certiorari (Case No. 94-939) denied on January 17, 1995. Respondents here are the government entities on which Respondents in Case No. 94-939 served as members.

On July 21, 1989, Erpenbeck contracted to purchase all or none of Vespers' 264 acres. That contract contained a protective contingency, but Erpenbeck waived that protection on November 6, 1989. (App. *Infra*, 1a). Prior to a public hearing on Petitioners' Article 15 application, Erpenbeck removed its protected contingency.

Failing to close on the 264 acres by February 1, 1990, Erpenbeck forfeited its $150,000.00 earnest money to Vesper. (Petitioner Erpenbeck App., 17, fn. 3).

Crucial to purchase of the 264 acres was Erpenbeck selling 43.45 acres of it to Hyper Shoppes, Inc., (Hyper), parent company of Biggs Hypermarket. Without that sale, Erpenbeck would not close on the 264 acres. Erpenbeck had no agreement with Hyper until August 17, 1989. Tha agreement was only an option, giving Hyper the right to terminate for any reason prior to February 28, 1990, or 30 days after Boone Fiscal Court approved a development plan under Article 15, whichever was later. Even if Boone Fiscal Court approved the Erpenbeck development plan, Hyper had the right to terminate for any reason. (Petitioner Erpenbeck App., 16, and App., *Infra*, 22a).

Prior to 1986 all 264 acres was zoned industrial. As part of a 1986 comprehensive plan and zoning regulation update, a portion was zoned C-2/PD. The 264 acres is on the north side of Kentucky State Route 18, two miles west of interstate highway I-75 and I-71. The 1986 C-2/PD zoning provided a transition area between large residential developments south of Kentucky State Route 18 and industrial uses to the north. It allowed over 200 different commercial and office uses at a clustered, non-regional intensity. This segment of the Kentucky 18 corridor contained several large, undeveloped tracts making it sensitive to large scale, regional retail developments. These developments attract high volumes of regional traffic. The C-2/PD zone allowed more varied uses than C-1 or C-2 zones for existing and growing residential population in western Boone County. Section 1514 (Petitioner Erpenbeck App., 63) permitted uses not listed in the underlying zone. It made commercial

and office uses available to residents without going to congested areas near the interstates I-75 and I-71. The PD overlay regulated intensity of the underlying uses. It provided protection from the larger scale regional retail uses extending down the Kentucky 18 corridor from I-75 and I-71. The C-2/PD zone coordinated development with infrastructure in an area identified as needing protection in the comprehensive plan. The Court of Appeals of Kentucky correctly found that the C-2/PD zoning expanded uses for the site. (Petitioner Erpenbeck App., 20).

This C-2/PD zoning implemented the 1986 comprehensive plan and its land use plan element. That plan recommended this segment of the Kentucky 18 corridor be commercially developed, but not for regionally oriented massive retail. Regional retail development generates high volumes of traffic and the comprehensive plan identified areas closer to the I-75 and I-71 interstate highway system as appropriate for those uses. Without a PD overlay as part of the zoning classification, C-2 zoning would have allowed massive regional oriented retail development, contrary to the comprehensive plan. Over half the 264 acres remained zoned industrial (I-1) without the extra layer of PD review. Over 40 industrial uses were available as a matter of right. Access to the I-1 property could occur through the C-2/PD zone without overlay review. The PD review was triggered only when C-2 uses were sought in the C-2/PD zone. (Petitioner Erpenbeck App., 28-29).

Petitioners applied for C-2/PD approval on November 1, 1989. The development plan comprised 43.45 acres, 34.8 acres were zoned C-2/PD and 9 acres industrial (I-1). It showed 417,600 square feet of regional retail space and 2,113 parking spaces, all needed for the

regional retail use. All the retail center's commercial shipping and receiving areas and some of the required 2,113 parking spaces, were located in the industrial zone. (Petitioner Erpenbeck App., 28). The proposed development required excavation of 10,800,000 cubic feet of ground and the parking spaces measured 422,600 square feet, not including driving aisles. Over 90% of the 43.45 acres was under roof or paved. This proposal was regional retail development on a grand scale. It did not comply with existing zoning, conflicted with the comprehensive plan, and could not have been approved as submitted.

Petitioners contend they were wrongly subjected to PD overlay review and only applied to mitigate damages and exhaust remedies. This groundless contention is refuted by Erpenbeck's contract with Hyper dated August 16, 1989. Section 5(a) recites approval of a Concept Development Plan is required pursuant to applicable zoning regulations. Section 5(c) is more explicit, providing:

> "Final approval of the Concept Development Plan will not be deemed to have occurred until the Concept Development Plan with conditions acceptable to Buyer (Hyper) is adopted by the Boone County Planning Commission and a corresponding ordinance is adopted by the Boone County Fiscal Court and the time for appeal pursuant to K.R.S. Section 100.347 has expired without an appeal being filed." (App., *Infra,* 10a-11a).

This contract predates Petitioners' application by over two months. Petitioners knew when contracting with Hyper that ministerial review for principally permitted uses of an unrestricted C-2 zone did not apply. They knew Boone Fiscal Court final action by passing an ordinance was required for C-2/PD approval.

Petitioners knew their development plan extended beyond the 34.8 acres zoned commercial. To meet the February 1, 1990, closing deadline under the Vesper contract, Erpenbeck sought to move the C-2/PD zoning line through a zoning administrator interpretation to include the 9 acres zoned industrial. The zoning administrator refused to move the zoning line and Erpenbeck appealed the the Board of Zoning Adjustment. They were proceeding before that Board as well as the Planning Commission at the same time. (Petitioner Erpenbeck App., 17, fn.2). Petitioners were not taken by surprise by new or unknown regulations. They were well aware of the C-2/PD zoning classification, its requirements, and location on the 264 acres. Erpenbeck has owned, developed and served as consultants for property zoned with a PD overlay. Adjacent to the subject 43.45 acres is a 5.5 acre parcel Erpenbeck proposed to use as access to the regional retail center. It had C-2/PD and C-3/PD zoning with an approved development plan for car dealerships. On January 29, 1993, Erpenbeck sold this 5.5 acres to Waco Oil Company, Inc., for $530,000.00. That development plan was amended through PD review for a McDonald's restaurant. (App., *Infra,* 27a).

Petitioners own other large parcels of land and sought map amendments to zones witha PD overlay. On January 18, 1995, the same Erpenbeck family members received a favorable recommendation for C-2/PD rezoning on a 466 acre site. (App., *Infra,* 31a-37a). Petitioners own actions decimate their argument that C-2/PD zoning on its face allows no uses and is worthless.

Petitioners urge their development plan should have been reviewed based on unrestricted C-2 zoning. This argument is based on zoning the property never had. (Petitioner Erpenbeck App., 16). If the C-2/PD had been instead unrestricted C-2, the project still extended com-

mercial retail facilities into an industrial zone. The project could not have been approved as a matter of right even if the 34.8 acres had been zoned C-2. The commercial intrusion into the I-1 zone is a zoning deviation. Without a PD overlay as part of the zoning classification, this zoning deviation could not have even been considered. (Petitioner Erpenbeck App., 59-60, Sec. 1506).

Petitioners' position the C-2/PD zone lacked standards is unsupported. Section 1504 requires a development plan before developing any property having a PD overlay as part of its zone. Minimum contents include transportation patterns, existing and proposed land uses and structures and relationship of the proposed development to the comprehensive plan, which includes its land use plan element. (Petitioner Erpenbeck App., 56).

Section 1506 (Petitioner Erpenbeck App., 59-60) requires the Planning Commission to apply certain standards in reviewing a proposed development based on facts presented at a public hearing. The Planning Commission must apply the following criteria to a proposed development plan:

(1) Consistency with Section 1500;

(2) Whether proposed development advances general welfare of the community and neighborhood; and

(3) Whether the proposed land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area justify deviation from standard district regulations.

Section 1500 PD (Petitioner Erpenbeck App., 53-54) criteria for reviewing a development plan includes:

(1) A useful pattern of open space;

(2) A development pattern preserving and utilizing natural topography, trees and vegetation in ex-

change for development intensity elsewhere on site;

(3) Encourages cluster development as a more efficient use of land; and

(4) Development in harmony with land use density, transportation facilities, community facilities and objectives of the comprehensive plan.

The Planning Commission applied these standards and recommended the development plan be denied. A nine (9) page report listed reasons based on land use impacts, conflict with the comprehensive plan, excessive intensity of the development, traffic generation issues, land use incompatibility, and the development's extension into the industrial zone. (App., *Infra,* 38a-52a).

Petitioners did not challenge the Planning Commission's recommendation or any of its findings, but attended the Boone Fiscal Court meeting of February 6, 1990. Unknown to Respondents, Hyper had already terminated its agreement. The only C-2/PD project proposed no longer existed. Petitioners were aware Boone Fiscal Court could override the recommendation. Erpenbeck had consulted for other PD developments in which the Planning Commission recommendation had been overridden by the governmental legislative body.

Petitioners improperly inject subsequent approval for a Biggs Hypermarket elsewhere in Boone County. That approved site received a zoning map amendment nearly a year later containing many conditions making it compatible with the comprehensive plan. It abutted I-75 and I-71 and had access to three interstate interchanges. Among the zone change conditions, Biggs was not permitted to open until major road improvements were completed. No elected or appointed official of Respondents or any of

their staff steered Hyper to this or any other site. (App. *Infra,* 53a-60a, 63a-66a).

Petitioners blatantly misrepresent testimony of Bruce Ferguson, then Boone County Judge/Executive. He was the chief elected official of the County's legislative body. Petitioners' counsel acknowledged they were not seeking expert testimony from him. (Ferguson dep., pp. 4-7, 17 and 59-61). Judge Ferguson testified the C-2/PD zone allowed uses referenced by the underlying zone, subject to considerations of the extra layer of review through the PD process. Three times Judge Ferguson disagreed with Petitioners' comments that PD zoned property had no use. (Ferguson dep., pp. 27, 29-30, 49 and 66). Judge Ferguson simply testified that the many underlying C-2 uses would be subject to the PD overlay review on property zoned C-2/PD.

Petitioners' continued attack on Boone Circuit Judge Bamberger's Opinion is unjustified. Kentucky's Court of Appeals rejected this argument and the Supreme Court of Kentucky denied discretionary review. (Petitioner Erpenbeck App., 12 and 15). Petitioners first made this charge in a Motion to Alter, Amend and Vacate. Judge Bamberger issued a 3 page Order overruling, stating the Opinion and Order as entered "is this court's independent decision." Petitioners were asked to tender a proposed Opinion, made no objection, and submitted an opinion to Judge Bamberger. (App., *Infra,* 67a-69a).

Petitioners argue they have a federal constitutional right to unrestricted C-2 zoning. The unsoundness of this position is clear. It depends on zoning the property never had and Petitioners never sought through a zone change. Boone Fiscal Court rejected this zoning during three county wide zoning updates. Petitioners had no protected

property interest as a matter of right to a project that violated zoning and conflicted with the comprehensive plan.

REASONS FOR DENYING PETITION

Petitioners have shown no violation of any constitutional right. Instead, Petitioners ask this Court to employ the Constitution as a means to become a "federal super-legislative body" to oversee local government legislative zoning decisions. Respondents' C-2/PD zoning decision lawfully advanced legitimate government interests in regulating land use. This zoning accomplished this purpose without denying Petitioners' viable use. Respondents' actions do not constitute a Fifth Amendment taking or a Fourteenth Amendment due process violation.

Petitioners had no constitutional right or entitlement to the only C-2/PD approval sought. Nor does the Constitution mandate a rezoning to unrestricted C-2, a zone the property never had. Petitioners lack a legitimate protected property interest in the only application denied, which leaves their 42 U.S.C. §1983 claims unsupported.

ARGUMENT

I.

PETITIONERS LACK A PROTECTED PROPERTY INTEREST IN THE ONLY ZONING APPLICATION DENIED TO SUPPORT A FIFTH AMENDMENT TAKING AND A FOURTEENTH AMENDMENT DUE PROCESS CLAIM UNDER 42 U.S.C. §1983.

Petitioners had no constitutionally protected entitlement or justifiable expectation to development free of all regulation. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), land use has been subject to reasonable government regulation based on planning. Only where government goes too far or leaves the owner with no viable use is the Constitution violated. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

In *Nectow* zoning as applied left no practical use and *Mahon* found the Kohler Act solely regulated a private dispute. These regulations failed to advance a legitimate government interest, violating due process. In both instances, a clear protected entitlement or expectation was affected, which Petitioners lack.

Petitioners possessed a legitimate expectation to commercially develop that portion zoned commercial, subject to a development plan satisfying the criteria of the PD review. This process included a review for development intensity consistent with the comprehensive plan and existing or planned infrastructure. Petitioners had no legitimate entitlement as a matter of right to commercial development extending into the I-1 zone which failed to satisfy the limited discretionary C-2/PD procedure. Rather than overreaching, the C-2/PD and I-1 zoning promoted Petitioners' protected interest. It provided

zoning to enable Petitioners to develop property consistent with proper land use planning. Petitioners had no constitutional entitlement as a matter of right to development that deviated from existing zoning.

The Kentucky Court of Appeals properly relied on *Agins v. City of Tiburon*, 447 U.S. 255, 261-262 (1980). Petitioners misread *Agins* as based on ripeness. To the contrary, *Agins* holds as a matter of law that Tiburon's residential planned development overlay zone on its face did not violate the Fifth Amendment or Fourteenth Amendment. The overlay review regulated intensity of proposed development, just as the Respondents' C-2/PD zone. Facially, it denied no use and owners were free to pursue reasonable investment backed expectations by submitting development plans. The overlay zone in *Agins* advanced the same government interests of assuring careful and orderly development without excessive intensity and providing open space that the C-2/PD regulation promotes. See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Regulations imposing a reasonable discretionary review process are facially neutral, denying no use. Existence of a permitting review system implies approval can occur. Accordingly, mere enactment of a discretionary regulation does not on its face violate due process or constitute a taking. *Keystone Bituminous Coal Ass'n. v. DeBenedictus*, 480 U.S. 470 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The Constitution affords government the right to govern. No protected interest or expectation is lost facially to a discretionary review and approval process. There is no constitutional right to be free of all delay. *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 U.S.

304, 321 (1987). Only where extraordinary regulatory delay results, leaving no viable use without advancing legitimate government interest has there been government overreaching. The C-2/PD regulation imposed no unusual delay and Petitioners never applied for commercial development approval confined to the commercial zone.

Petitioners wrongly rely on *Lucas v. South Carolina Coastal Council*, _____ U.S. _____, 112 S.Ct. 2886 (1992) to assert a protected property interest. David Lucas' beach lots when purchased were zoned and approved for development with no further discretionary review. South Carolina's Beachfront Management Act precluded all occupiable structures on either of these two lots, with no exception. Thereafter, the Act was amended to provide a special use process, but until then Mr. Lucas' constitutional investment backed expectations were denied. Petitioners never had unrestricted C-2 zoning and many alternative viable uses were available through the PD review process.

Lucas, supra, supports Respondents, holding no constitutional violation occurs when the proscribed use or activity was not part of Petitioners' protected expectations, title or ownership. Kentucky and other states have so applied *Lucas* in several cases involving discretionary regulatory approvals. *Ward v. Harding, Ky.*, 860 S.W. 2d 280 (1993); *Wheeler v. City of Wayzata*, 511 N.W. 2d 39 (Minn. 1994); *Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993); *Comnty. Conc. Citizens v. Union Twp.*, 613 N.E.2d 580 (Oh. 1993); and *Kelly v. TRPA*, 855 P.2d 1027 (Nev. 1993), *cert. denied*, 114 S.Ct. 684 (1994). Two federal decisions reflecting a long line of cases applying this Court's precedent are *Silver v. Franklin Tp. Board of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992) and *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th

Cir. 1994), *cert. denied*, 115 S.Ct. 193 (1994). Consistent with the state court decisions, these cases hold there is no constitutional legitimate claim of entitlement or justifiable expectation to discretionary permit approval. Both decisions uphold regulations requiring discretionary permit plan approval as constitutional. See also *RRI Realty Corp. v. Inc. Village of Southampton*, 870 F.2d 911 (2nd Cir. 1989) and *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). Petitioners cite no authority recognizing a facially protected constitutional expectation as a matter of right to a discretionary regulatory zoning permit.

II.
RESPONDENTS' ACTIONS DO NOT CONSTITUTE A FIFTH AMENDMENT TAKING OR FOURTEENTH AMENDMENT DUE PROCESS VIOLATION.

Assuming a constitutional protected entitlement, Respondents' actions do not constitute a taking under the Fifth Amendment or a Fourteenth Amendment due process violation of that property interest. The C-2/PD zoning advanced a legitimate government interest and did not deny Petitioners all beneficial or productive use of the property, particularly when considering the entire 264 acres as a whole, as Petitioners did. Moreover, this regulation and denial of the only development plan submitted are not actions of undue interference of an arbitrary, capricious, or irrational character. It has a legitimate and appropriate relation to the government objective to be obtained through that regulation. *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

Kentucky law enables local government to enact zoning regulations based on a prior prepared comprehensive

plan. Chapter 100 of the Kentucky Revised Statutes is the enabling legislation for regulating land use. Authorized purposes of regulation are set forth in K.R.S. 100.201 and 100.203(1). These purposes include facilitating orderly and harmonious development, and regulating density of population and intensity of land use. Other purposes include protection of transportation facilities, particularly activities at or near transportation arteries. To accomplish these statutory purposes, local governments may enact special zoning districts pursuant to K.R.S. 100.203(1)(e). These are the very purposes underlying the need for the C-2/PD zoning within the Kentucky 18 corridor. Such zoning made available many uses not otherwise appropriate by regulating intensity through the PD review process. It advanced legitimate government interest of coordinating development with infrastructure and provided many alternative realistic uses.

Kentucky courts have interpreted the enabling legislation, recognizing that PD overlay zones are allowed. *Bellemeade Co. v. Priddle,* Ky., 503 S.W.2d 734 (1974) and *Danville-Boyle County v. Prall*, Ky., 840 S.W.2d 205 (1992) uphold identical standards and criteria as the challenged Article 15. When keyed to a comprehensive plan, discretionary overlay zones are valid exercises of the police zoning power and do not lack sufficient standards. To meet these standards, Petitioners could have scaled the project down to a less intensity, clustered the development to provide open space and afforded compatibility with adjacent residential development to the south and west. Lessened intensity would lower traffic generation and be consistent with the comprehensive plan.

Regulatory taking and due process analysis focuses on the purpose of the challenged regulation, whether it

advances a legitimate government interest, the economic impact, and what remains. The challenged C-2/PD regulation advanced government interests through implementation of the comprehensive plan while expanding available uses for the Kentucky 18 corridor. While Respondents denied Petitioners only application, that denial did not preclude all viable use, nor was it so intended. The January 3, 1990, Committee Report adopted by the Boone Fiscal Court concludes (App., *Infra*, 52a):

> "This site has many development possibilities, however, we do not believe that this is an appropriate use based on the information stated and for the reasons listed above. Further, we are of the opinion that this use could occur in Boone County if properly located."

Petitioners misapply *Dolan v. City of Tigard*, _____ U.S. _____, 114 S.Ct. 2309 (1994). There, local government exacted private property for a public purpose without showing any connection between the regulated development and the need for the exaction. Respondents imposed no condition amounting to an exaction. Petitioners proposed a development violating zoning and failing to conform to the comprehensive plan and other PD criteria. In *Dolan* the proposed use and its intensity was allowed as a matter of right.

Petitioners cite *City of Buford v. Ward*, 443 S.E.2d 279 (Ga. 1994) and *New Motor Vehicle Board of Ca. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). These decisions do not support Petitioners. In *City of Buford* due process and equal protection claims were dismissed as a matter of law for the very reason Petitioners fail here. Governmental denial of a permit did not violate a constitutionally protected right or entitlement. The same principle applied in *Orrin W. Fox Co.* as no protected liberty or

property interest was found to satisfy *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Grayned v. City of Rockford*, 408 U.S. 104 (1972) upholds a noise ordinance as having sufficient standards. While its contents were flexible, what it prohibited as a whole was found constitutionally clear. For similar reasons, *Anderson v. City of Issaquah*, 851 P.2d 744 (1993), does not support Petitioners. This decision found invalid an architectural review regulation based on unwritten and undescribed "feeling" or "image" for development on a particular street. Decision makers were left with only their individual subjective feelings about what the image should be. The regulation was not keyed or referenced to any particular description in a comprehensive plan or similar land use study. Such is not the case with Article 15.

Article 15 standards and criteria reference specifically the comprehensive plan and other appropriate land use factors for this segment of the Kentucky 18 corridor. These standards and criteria provide that degree of ascertainability required in *Standard Mining and Development Corp. v. Auburn*, 510 P.2d 647 (1973), which is cited and distinguished in *Anderson*. In *Standard Mining* zoning regulations governing special discretionary use permits for gravel pit operations were challenged for lack of standards. Since a discretionary permit was required with a public hearing review process, standards keyed to the comprehensive plan were upheld. These flexible standards as part of a public hearing review with a right of appeal satisfied due process. The C-2/PD review required a public hearing and findings made from facts presented. Petitioners were afforded and availed themselves of the statutory appeal process under K.R.S. 100.347 as part of their Complaints and Amended Complaints in state court. (Petitioner Enterprise VI App., 33a and Petitioner Erpenbeck App., 37).

Petitioners also cite *Connally v. General Const. Co.*, 269 U.S. 385 (1926), challenging the Oklahoma minimum per diem wage statute. The state stature was found to be invalid for lack of certainty as to the rate of regulated wages and the locality to determine that rate. Unlike Oklahoma's statute, Article 15 contains sufficient standards and criteria for available uses. It also provides a procedure through a public hearing process to resolve any ambiguity. In *Kawaoka v. City of Aroyo Grande*, 17 F.3d 1227 (9th Cir. 1994), *cert. denied*, 115 S.Ct 193 (1994), standards nearly identical to Article 15 were upheld as a matter of law for a land use regulation requiring a specific development plan. Requiring a specific development plan was constitutional as a rational planning device to coordinate development with infrastructure where large undeveloped tracts were proposed for development.

Petitioners' position has no similarity to *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). There, denial of the fill permit under wetlands legislation denied all use. Instead, *Tabb Lakes, LTD. v. U.S.*, 10 F.3d 796 (Fed. Cir. 1993) applies and requires denial of further review. Citing *Lucas, Agins*, and *First English*, supra, the Court of Appeals found a discretionary wetlands fill permit denial was not a constitutional violation. In support the Court of Appeals quoted *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985):

> "The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense; After all, the very existence of a permit

> system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. *Only when a permit is denied and the effect of the denial is to prevent "economic viable" use of the land in question can it be said that a taking has occurred."* (Emphasis added).

Kentucky's state courts correctly ruled as a matter of law that Petitioners were not entitled to relief. Then as now they could not sustain their burden of showing an entitlement to the only zoning approval denied. The C-2/PD regulation advanced legitimate government interest in land use planning and imposed no undue adverse economic impact on any protected investment backed expectation for the development as proposed. Nor can they show that Hyper would have purchased even if Boone Fiscal Court had approved the application. The record below is undisputed that Petitioners' development plan was not fully acceptable to Hyper. To make it more acceptable, the retail building had to be placed in the rear 9 acres zoned industrial. (App., *Infra,* 61a-66a; Petitioner Erpenbeck App. 29).

Other flaws fatal to Petitioners' 42 U.S.C. §1983 claims are ripeness and being time barred. Petitioners have not satisfied the "finality" prong of *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985). Without "finality" government decision making has not become a constitutional violation. Petitioners' facial claims assert the C-2/PD by its mere enactment violates their constitutional rights. The applicable statute of limitations for Petitioners' 42 U.S.C. §1983 claims is Kentucky's 1 year provision in K.R.S. 413.140(1)(a). *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179 (6th Cir. 1990).

In constitutional facial attacks, the statute of limitations commences immediately upon enactment. *National Advertising Co. v. City of Raliegh*, 947 F.2d 1158 (4th Cir. 1991) *cert. denied*, 112 S.Ct. 1997 (1992). Respondents enacted the C-2/PD zoning on Petitioners' property in 1986 and Petitioners participated in that county-wide zoning update. Petitioners commenced no action within the allowed time.

As part of the 1991-92 county-wide zoning update, that portion of Petitioners' property zoned C-2/PD was rezoned with no objection from Petitioners to C-4. This zoning classification allows over 30 commercial uses without PD review, with no user exceeding 100,000 square feet. Under either the C-2/PD or the current C-4 zoning, Petitioners' development plan could not be approved.

CONCLUSION

Respondents urge the Petitions for Certiorari be denied. Petitioners lacked a constitutionally protected property right to a development plan approval that violated existing zoning and conflicted with the comprehensive plan. They had no investment backed expectations for such a development. Petitioners present no special or important reasons giving rise to further review. Instead, Petitioners ask this Court to exercise a legislative function of local government. Simply stated, Petitioners' action depends on a zoning classification the property never had and presumes, without support, that

none of the hundreds of available uses would be approved. The Court of Appeals of Kentucky properly applied precedent of this Court and Petitioners present no unsettled question of federal law.

Respectfully submitted,

DALE T. WILSON
ROUSE, SKEES, WILSON & DILLON
7699 Ewing Boulevard
P.O. Box 756
Florence, Kentucky 41042-0756
(606) 371-7407

Counsel for Respondent,
Boone County
Planning Commission.

LARRY J. CRIGLER
6024 Rogers Lane
P.O. Box 169
Burlington, Kentucky 41005
(606) 586-9950

Counsel for Respondent,
Boone County
Fiscal Court.

APPENDIX A

BUSALD FUNK ZEVELY, P.S.C.

ATTORNEYS AND COUNSELORS AT LAW

226 MAIN STREET
FLORENCE, KENTUCKY 41042–6910
606/371-3600 · 606/371-2300
TELECOPIER 606/525-1040

November 6, 1989

Mr. Paul J. Vesper
Attorney at Law
8100 Burlington Pike
Suite 400
P.O Box 576
Florence, KY 41042

Mr. Dennis J. Vesper
Enterprise VI
709 St. Joseph Lane
Covington, KY 41011

RE: Burlington Pike Property

Dear Mr. Vesper:

Per paragraph (17) of the CONTRACT FOR PURCHASE AND SALE between Enterprise VI and Erpenbeck Commercial Enterprises, Inc., dated July 21, 1989, this is to confirm that my client's wish to waive the contingencies set out in paragraph 11(A) of same.

Should you have any questions, please do not hesitate to call.

Very truly yours,

BUSALD FUNK ZEVELY, P.S.C.

/s/ Thomas R. Nienaber
Thomas R. Nienaber

TRN:mjk
Certified Mail, Return Receipt Requested
cc: Erpenbeck Commercial Enterprises, Inc.
4205 Dixie Highway
Erlanger, KY 41018

APPENDIX B

REAL ESTATE PURCHASE AGREEMENT

THIS REAL ESTATE PURCHASE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into by and between ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky corporation (hereinafter referred to as "Seller"), HYPER SHOPPES, INC., a Delaware corporation (hereinafter referred to as "Buyer"), and THOMAS R. NIENABER, as Escrow Agent (hereinafter referred to as "Escrow Agent").

W I T N E S S E T H:

WHEREAS, Seller does hereby agree to convey to Buyer, who agrees to purchase from Seller, a 41(±) acre tract of real estate lying and being located on Kentucky Highway 18, Florence, Boone County, Kentucky said property being more particularly described and identified below; and

WHEREAS, it is understood and acknowledged by Buyer and Seller that Seller herein has contracted with various third parties for the purchase of the 41(±) acre tract of real estate, in addition to other adjoining acreage; and

WHEREAS, Buyer and Seller acknowledge that Seller's contract to purchase the subject real estate with said third parties is subject only to obtaining certain zoning approvals; and

WHEREAS, Buyer and Seller desire to enter into this Agreement for the purchase of the Property, subject to the following terms and conditions.

NOW, THEREFORE, in consideration of the foregoing premises and mutual promises and undertakings hereinafter specified, the parties hereby covenant and agree as follows:

1. PROPERTY

(a) Seller agrees to convey to Buyer, who agrees to purchase from Seller, an approximate 41(±) acre treat of real estate, lying and being located at Kentucky Highway 18, Florence, Boone County, Kentucky, said 41(±) acre tract of real estate, being outlined on the attached plat, identified as Exhibit "A", a copy of which is incorporated herein by reference. Said 41(±) acre tract shall hereinafter be referred to as the "Property".

(b) Seller shall within 30 days from the date hereof obtain, at Seller's cost, a survey and legal description of the Property, prepared by a registered Kentucky surveyor, certified to Seller, Buyer and, if requested by Buyer, Buyer's title insurance company. Such survey shall stake all boundary corners and indicate the location of rights of ways and easements and indicate the acreage located within the Property as well as the acreage encumbered by rights of way or easements within the Property.

(c) Buildings, structures or improvements presently located on the Property and all crops, crop bases, tobacco poundage allotments, standing timber, residential or any type of farming structure, or any and all other types of standing crops of improvements shall not be included in the Purchase Price and any and all such structures, improvements, crops, etc. as herein before stated, shall remain the sole and separate property of Seller provided, however, that any and all buildings, structures, standing crops, timber, etc. as herein before stated, shall be removed from the Property by Seller at Seller's cost and

expense prior to Closing. Any and all such improvements, structures, crops, timber, etc. left on the Property at time of Closing shall become the property of Buyer.

2. PURCHASE PRICE

(a) The purchase price to be paid by Buyer to Seller for the Property (hereinafter referred to as "Purchase Price") shall be a sum equal to the product of $120,000.00 multiplied by the number of acres (calculated to the nearest 1/100 of an acre and based on the survey obtained pursuant to Paragraph 1 above) contained within the Property net of acreage encumbered by easements or rights of way of record.

(b) The Purchase Price shall be paid by the Buyer to the Seller at closing in cash or certified or cashier's check, less the amounts of Earnest Money paid by Buyer to Seller as provided for herein. Payment of the Purchase Price shall also be subject to the Escrow Provisions set out in Paragraph 6 hereof.

3. Earnest Money

(a) Buyer shall deposit the following earnest money deposits (the "Earnest Money"): (i) at the execution hereof, an initial Earnest Money deposit in the sum of Fifty Thousand Dollars ($50,000.00), (ii) thereafter Buyer shall pay additional Earnest Money of Ninety Thousand Dollars ($90,000.00), said sum being payable in six (6) equal installments of Fifteen Thousand Dollars ($15,000.00) each, the first of such installments to be payable on or before September 1, 1989 with a like Fifteen Thousand Dollar ($15,000.00) payment on the first day of each month thereafter, until the entire additional Earnest Money of Ninety Thousand Dollars ($90,000.00) is paid in full, (iii) In the event that Buyer elects to

extend the Closing beyond February 28, 1990, and the zoning approval under Paragraph 5 has not been obtained, then Buyer shall make the additional Earnest Money deposits provided in Paragraph 4(b), below. The additional deposits under this Paragraph 3(a)(iii) are to be applied to the Purchase Price at Closing.

(b) All Earnest Money shall be deposited by Buyer to Thomas R. Nienaber as Escrow Agent and shall be in an interest bearing Earnest Money account at Florence Deposit Bank, Florence, Kentucky.

(c) In the event this transaction should close as provided for herein, then and in such event, the principal amount of Earnest Money paid under Paragraph 3 (except payments made under Paragraph 3(a)(iii)), shall be applied to the Purchase Price with all interest accrued on such Earnest Money being paid to the Seller and not applied to the Purchase Price. In the event that this transaction shall not close as provided for herein, then all Earnest Money and accrued interest shall be disbursed as provided in Paragraphs 4, 5, 8, 12 and 15 hereof.

(d) Thomas R. Nienaber shall serve as Escrow Agent for purposes of investing and retaining all escrow moneys paid herein by Buyer to Seller. Escrow Agent shall make all disbursements as provided for in Paragraphs 4, 5, 8, 12 and 15 hereof.

4. CLOSING AND CLOSING DATE

(a) The Closing shall be held on or before the later of (i) February 28, 1990, or (ii) 30 days after zoning approval has been obtained under Paragraph 5, subject to Buyer's estension rights under Paragraph 4(b), below.

(b) In the event that the Closing should not occur before February 28, 1990, Buyer shall have the right to extend the Closing Date, in Buyer's sole discretion, on a month to month basis until the later of February 28, 1991 or 30 days after Seller has obtained the zoning approval under Paragraph 5. Should Buyer make such election or elections to extend the Closing Date, Buyer shall pay a sum of Twelve Thousand Five Hundred Dollars ($12,500.00) for each calendar month or any portion thereof that the Closing Date is extended. Such extension payments shall be applicable to the Purchase Price at Closing. All additional monthly payments shall be due and payable on or before the first day of each calendar month for which Buyer elects to extend. Such $12,500 extension payments shall be made directly to Seller and not to the Escrow Agent if the zoning approval under Paragraph 5 has been obtained at the time such extension payment is due. In the event that Seller should institute any litigation and/or appeal from action taken by either the Boone County Planning and Zoning Commission and/or the Boone Fiscal Court regarding the application for approval of Concept Development Plan as provided for herein, then the Buyer shall have the right to extend this agreement and the Closind Date by paying to Escrow Agent, as additional Earnest Money, on the first day of each calendar month during such period of litigation and/or appeal the sum of Twelve Thousand Five Hundred Dollars ($12,500.00). If the within transaction should close after favorable resolutionof such litigation and/or appeal, then all such $12,500.00 payments and interest thereon shall be applied to the purchase price. If such litigation and/or appeal is not resolved in favor of Seller and this transaction is not concluded, all $12,500.00 payments made by Buyer to Seller during that period of litigation and/or appeal, and any interest

thereon shall be returned to the Buyer. Seller shall not be under any obligation to institute an appeal or any other litigation resulting from any action taken by the Boone County Planning and Zoning Commission and/or the Boone Fiscal Court and any decision made relative thereto shall be made by Seller in Seller's sole judgment and discretion.

(c) In the event that Buyer should fail to exercise its right to terminate this Agreement on or before February 28, 1990 or such later date as provided for in Paragraph 15,(a) and this transaction does not close on or before February 28, 1991 due to default of Buyer, then and in such event, all Earnest Money and accrued interest thereon, and any and all other additional sums paid to extend the Closing Date, shall become the property of Seller, free and clear of all claims and demands, which sum shall be considered as partial damages with Seller being reserved any and all other causes of action at law or equity including, but not limited to specific performance as provided for under Kentucky law.

MP for PAW

(d) At Closing, all nondelinquent real property taxes apportioned to the Property shall be pro-rated between Seller and Buyer, said proration to be based upon the most recent available tax valuation information, as provided by the Boone County Property Valuation Administrator. Seller shall be responsible for any recoupment of real estate taxes pursuant to KRS §132.452 applicable to the period prior to the Closing Date as a result of any agricultural valuation of the Property under KRS §132.450.

(e) Within thirty (30) days from the Buyer's receipt of the survey required under Paragraph 2, Buyer shall obtain a title commitment for the Property and Buyer shall notify Seller in writing as to any and all exceptions

to title shown by such title commitment or survey to which Buyer objects including, but not limited to easements, assessments, restrictions, and any and all other matters of record. Seller shall remove or cure such objectionable title exceptions to Buyer's satisfaction within 60 days after receipt of Buyer's objections. In the event that no objection is made by Buyer to Seller, with respect to a matter shown by the title commitment or survey, Buyer shall be deemed to have waived such exception and shall take title to the Property subject to the same.

(f) At Closing, Buyer and Seller agree to execute and deliver any and all papers as may be legally necessary to carry out the terms of this Agreement, including, without limitation:

(i) A General Warranty Deed executed by Seller, conveying fee simple marketable record title to the Property to Buyer, free and clear of all tenants rights , liens, easements, reservations, restrictions and encumbrances whatsoever, excepting only such matters as are disclosed by the survey and/or the title commitment described above and which are not objected to by Buyer.

(ii) An Owner's Affidavit in form acceptable to Buyer's Title Insurer.

(iii) Such documentation as may be reasonably required by Buyer's Title Insurer to evidence Seller's authority to convey the property to Buyer.

5. ZONING APPROVAL

(a) Buyer and Seller acknowledge and understand that, Seller shall be required to obtain various certificates of

approval from the appropriate Planning and Zoning regulatory bodies in Boone County, Kentucky for a Concept Development Plan permitting the construction of an approximately three hundred thirty-seven thousand (337,000) square foot retail building on the Property. The term "Concept Development Plan", as provided for herein, shall be defined and interpreted pursuant to the current Planning and Zoning Regulations of Boone County, Kentucky. Seller agrees to act diligently and in good faith and take all reasonable steps necessary to obtain the approval of a Concept Development Plan by the appriate Planning and Zoning Authorities in Boone County, Kentucky on or before February 28, 1990. Buyer agrees to reasonably cooperate and assist Seller in all reasonable ways in obtaining Concept Development Plan approval from the appropriate Planning and Zoning authorities in Boone County, Kentucky.

(b) Buyer and Seller will cooperate in the development of the Concept Development Plan to be submitted. Buyer shall provide Seller with its preliminary site layout by September 1, 1989 and Seller will submit a Concept Development Plan for consideration of the Boone County Planning and Zoning Commission at its October 4, 1989 meeting. Changes to the submitted Concept Development Plan will not be made without the consent of Buyer.

(c) In the event that Seller is unable to obtain approval of the Concept Development Plan and Buyer elects to terminate this Agreement pursuant to Paragraph 15, then and in such event, all Earnest Money and the interest thereon shall be refunded pursuant to Paragraph 15 with Buyer and Seller having no further legal obligations to the other by virtue of the terms and conditions hereof except as provided in Paragraph 5(f) below. Final

approval of the Concept Development Plan will not be deemed to have occurred until the Concept Development Plan with conditions acceptable to Buyer is adopted by the Boone County Planning Commission and a corresponding ordinance is adopted by the Boone County Fiscal Court and the time for appeal pursuant to KRS Section 100.347 has expired without an appeal being filed. Seller will promptly notify Buyer of the date of expiration of the appeals period (and, therefore, the date deemed to be final approval hereunder) and evidence of the approval.

MP for PAW

(d) Buyer shall be responsible to Seller for the payment of all necessary and reasonable costs incurred by Seller in order to obtain approval of the Concept Development Plan, provided that Buyer's liability for such costs and expenses shall not exceed One Hundred Fifty Thousand Dollars ($150,000.00). Upon execution hereof, Buyer shall deposit with Seller the sum of Fifty Thousand Dollars ($50,000.00) as partial payment toward the costs and expenses incurred by Seller in obtaining Concept Development Plan approval. On or before the first day of each month during the term of this Agreement, Seller shall provide Buyer an itemized listing of all costs and expenses incurred by Seller in obtaining Concept Development Plan approval. At such time as Seller depletes the initial Fifty Thousand Dollar ($50,000.00) cost and expense deposit, Buyer shall forthwith deliver to Seller an additional Fifty Thousand Dollars ($50,000.00) for the payment of all subsequent costs and expenses incurred. At such time as the second Fifty Thousand Dollar ($50,000.00) deposit for costs and expenses is depleted, Buyer shall deliver to Seller the third and final Fifty Thousand Dollar ($50,000.00) deposit for costs. All cost and expense

funds remaining on deposit with Seller at such time as the Concept Development Plan is approved shall be delivered by Seller to Buyer with a complete accounting of all costs and expenses incurred. Seller need not obtain Buyer's approval prior to expending any and all sums for costs incurred in obtaining approval of the Concept Development Plan. It is agreed by Buyer that Seller shall be entitled to use Seller's reasonable judgment and discretion in determining what costs should be incurred in obtaining Concept Development Plan approval, and that such reasonable judgment and discretion shall be final and not subject to contest or objection by Buyer. Buyer shall be reserved the right to recommend to Seller any expenditures which Buyer deems appropriate and necessary to obtain Concept Development Plan approval; however, such suggestions and requests shall not be binding upon Seller. In the event that Planning and Zoning Commission denies the Concept Development Plan, the costs of a lawsuit or other legal action to overturn such decision will be at Seller's sole expense. Seller shall not be required to pursue any litigation and/or appeal of any action taken by the Boone County Planning and Zoning Commission and/or Boone Fiscal Court unless Seller deems it appropriate in Seller's sole judgment and discretion.

(e) All costs incurred by Seller in obtaining Concept Development Plan approval shall not be considered or act as a credit to any portion of any Earnest Money or Purchase Price to be paid by Buyer to Seller, not to any charge for extending the Closing as provided for herein.

(f) In the event that Seller is unable to obtain approval of the Concept Development Plan, Buyer shall not be entitled to reimbursement of any and all such costs

or expenses incurred by Seller in obtaining approval of the Concept Development Plan; however, Buyer shall be entitled to all plans, designs and other work product prepared in connection with the Concept Development Plan.

6. SITE GRADING AND IMPROVEMENTS

(a) Seller shall, at its sole cost and expense, provide all grading services for the Property to meet all specifications and standards of the Buyer (as set forth in attached Exhibit B) and all site grading plans and elevations as mutually agreed upon by Buyer and Seller. Buyer shall be responsible for providing at its sole cost and expense all engineering and related services necessary in preparing all plans, specifications and standards regarding site grading requirements necessary to meet those requirements of Buyer. Buyer and Seller agree that within forty five (45) days following the execution hereof, Buyer and Seller shall mutually agree upon a Site Grading Plan setting forth all site grading elevations. Buyer and Seller acknowledge that the appropriate Planning and Zoning Authorities may require various conditions relative to site grading and that Buyer and Seller shall, as is reasonably practical, cooperate with and accommodate any and all such conditions as may be required.

(b) Seller shall, at its sole cost and expense, construct up to the Southwest Property line (that property line fronting on Kentucky Highway 18) all water mains, sanitary sewer lines and utility services with capacity necessary to meet all existing Boone County and Commonwealth of Kentucky building code requirements for the proposed building and as may be required by the appropriate Planning and Zoning Authorities. Seller shall be responsible for any assessments or similar charges (other

than customary tap-in fees) in connection with the installation of such facilities In no event shall Seller be required to extend any water mains, sanitary sewer lines, or other utility services onto and/or across the Property. If any such extensions are required as a condition of the Concept Development Plan approval, then and in such event, Buyer shall agree to assume the cost of such lines serving improvements on the Property and Seller will be responsible for the costs of any extensions necessitated to serve tracts other than the Property.

(c) Seller shall, also construct the following streets and roadways at Seller's sole cost and expense: (i) proposed Centennial Circle (in accordance with the Improvement Plan for Heritage Hill Industrial Center) and in accordance with the construction standards and requirements of the local governmental jurisdiction for the dedication and acceptance of streets); (ii) a two-lane access road from the East side of the property to Centennial Circle (as shown on Exhibit A) in accordance with the construction standards and requirements of the local governmental jurisdiction for the dedication and acceptance of streets; (iii) proposed four-lane roadway from Kentucky 18 along the entire west boundary of the Property, as shown on Exhibit A, in accordance with the Construction Standards and requirements of the local governmental jurisdictions for the dedication and acceptance of streets. Seller will cause the proposed streets and roadways to be dedicated to and accepted by the local government jurisdiction and Seller will grant easements to Buyer to use such streets until such dedication and acceptance.

(d) Seller shall not be responsible for any improvements on the Property other than as provided for above. In the event that any turn lands, traffic signals or other road construction or road improvements are required by

Planning and Zoning authorities to obtain Concept Development Plan approval, the costs will be borne as provided in Paragraph 7.

(e) Upon Closing, Seller shall begin all site grading work and other improvements required to be undertaken by Seller under this Agreement and complete all such work in accordance with the construction schedule attached hereto as Exhibit C. All such work will be undertaken in a good and workmanlike manner, will be diligently pursued and will be free of liens or claims for liens. At Closing, the sum of Six Hundred Thousand Dollars ($600,000.00) shall be withheld from the Purchase Price to be held in Escrow with Thomas R. Nienaber as Escrow Agent. Escrow Agent shall disburse such funds from time to time as the site grading and other construction progresses based upon draw requests signed by Buyer and Seller. Buyer agrees to sign all draw requests upon receipt from Seller of evidence that (i) payments are due to contractors for such site grading or other construction, (ii) lien waivers have been obtained for the payments to be made and (iii) that sufficient funds remain in such escrow to complete the Seller's site grading and other construction obligations hereunder. When Seller and Buyer have certified that all such Seller's work has been completed, Escrow Agent shall pay any remaining escrow funds to Seller. All Escrow Money provided for under this paragraph shall be held at Florence Deposit Bank in an interest bearing account and all accrued interest on said Escrow Money shall be shared equally by Seller and Buyer. If Seller defaults in its construction obligations, Buyer shall be entitled to all undisbursed Escrow Money and all interest on the Escrow Money without prejudice to any other claims which Buyer may have against Seller arising out of such default.

7. PLANNING AND ZONING CONDITIONS

(a) Buyer acknowledges that the appropriate Planning and Zoning authorities may require various conditions as a condition precedent to approval of the submitted Concept Development Plan. In the event that any such "conditions" are required for approval of the Concept Development Plan, such conditions shall be subject to Buyer's consent, which will not be unreasonably withheld.

(b) If turn lanes, traffic signals or other road improvements to KY 18 are required by the Planning and Zoning Authorities to obtain Concept Development Plan approval, then Buyer shall pay for the cost of any improvements to that part of KY 18 along the frontage of the Property. In addition, if the Planning and Zoning Authorities should require any turn lanes or road improvements to KY 18 on the East side of Centennial Circle Drive, Buyer shall be required to pay the cost thereof. The Seller will pay or cause the Commonwealth of Kentucky to pay for the cost of turn lanes at the intersection of KY 18 and the proposed 4-lane road West of the Property. The cost of any traffic signals at KY 18 and the proposed 4-land road west of the Property will be shared equally by Buyer and Seller. The cost of the traffic signal at KY 18 and Centennial Circle Drive will be paid by Buyer. The cost of extension of the proposed 4-lane road to the West of the property site, detention and retention basins and other off-site improvements required by the Planning and Zoning Authority shall be at Seller's sole cost and expense and Seller agrees to construct same as part of its construction obligations under Paragraph 6. Seller shall only be required to pay that portion of the cost incurred relative to such improvements as are actually constructed off-site i.e. on that

portion of the real estate not actually included in the 41 acre (±) tract defined in Exhibit A. Buyer agrees that it shall be responsible for all construction costs of any and all other such improvements including the extension of the 4-lane road, detention and retention basins and any and other site improvements which are situated directly on the Property.

8. CONTINGENCIES; CONTRACT RIGHTS

(a) Buyer acknowledges that at the present time, Seller is under Contract with various third parties for the purchase of the Property and other property comprising a two hundred fifty-four (254) acre (±) tract of real estate lying and being located at Kentucky Highway 18, Florence, Boone County, Kentucky. Seller agrees to perform under such contract and to use best efforts, including taking legal action and seeking specific performance, to enforce its rights to purchase the Property. In the event that Seller defaults hereunder due to thru no fault of the Seller its inability to conclude its purchase of the Property, then all Earnest Money, all accrued interest thereon and all extension fees paid by Buyer to Seller ~~for zoning costs~~ shall be returned to Buyer. If such failure to conclude the purchase is due to Seller's ~~de~~default, then Buyer shall also be entitled to a return of all zoning costs paid to Seller and Buyer shall have such remedies against Seller as provided at law or in equity.

MP for PAW

MP for PAW

MP for PAW

MP for PAW

(b) Seller represents and warrants to, and covenants with Buyer that:

(i) Seller has an executed contract to purchase the Property with the fee title owner of the Property; that no default has occurred thereunder, that the contract is contingent only upon obtaining the

zoning approval contemplated by Paragraph 5, hereof obtaining clear title to the Property and obtaining court approval of the sale of a minor's interest in said real estate, and that Buyer will make all payments, give all notices and take all other actions necessary or appropriate to keep such contract in effect.

(ii) Seller will not (and will not enter into any agreement to or permit the owner of the Property to) convey, encumber or restrict the Property without first obtaining the written consent of Buyer.

(iii) To the best knowledge of Seller, the Property is not subject to any liens (other than regular installments of real estate taxes and mortgages in an aggregate amount not more than one Purchase Price, assessments, leases, unrecorded easements, options to purchase (other than Seller's rights and this Agreement), rights of first refusal or any other agreement or contract to use, lease or purchase the Property.

(iv) to the best knowledge of Seller, the Property has not been used for the manufacture, distribution, storage or disposal of any hazardous waste, hazardous substance or other pollutant (as those terms are defined by any federal or Kentucky law, statute or regulation) and no such hazardous wastes, substances or pollutants are located on the Property.

(c) This Agreement is contingent upon Seller obtaining approval from the Boone County Planning and Zoning Commission of the Concept Development Plan as more particularly described in Paragraph 5. In the event that

this approval is not obtained for any reason other than the negligence or willful non-cooperation of either party, then, subject to Paragraph 4 and 15, hereof, this Contract shall become null and void with neither party having any obligation to the other than all Earnest Money shall be paid to the respective parties as provided for in Paragraphs 4 and 15.

9. POSSESSION

(a) Seller shall delivery to Buyer full and exclusive possession of the Property at Closing, subject only to Seller's right to enter the Property for the purpose of performing all Site Gradin Excavation, as provided for in Paragraph 6. Any crops, timber, structures, or other improvements on the Property not removed prior to Closing shall be deemed to be abandoned by Seller.

MP
for
PAW

(b) Within ~~90~~ 60 days from the date hereof, Seller will furnish Buyer, at Seller's sole cost and expense, with a report of an environmental engineer certifying that the Property is free of all hazardous wastes, substances or other pollutants.

(c) Seller grants to Buyer the right to enter into the Property (which right Seller has under its contract to purchase the Property) to conduct inspections, surveys and tests of the Property.

10. REAL ESTATE COMMISSION

Buyer and Seller acknowledge that neither has obtained nor retained the services of any real estate broker or real estate agent for which any real estate commission would be due and owing as a result of the real estate closing contemplated herein. Buyer and Seller agree to indemnify and hold the other harmless for any

real estate commissions so charged against the respective parties by virtue of any agreement or contract which they may have with any real estate broker or real estate agent.

11. NOTICES

Any notices which are permitted or required hereunder shall be in writing and shall be deemed to have been duly given as of the date and time the same are personally delivered, delivered by overnight delivery service; or deposited with United States Postal Service, postage prepaid, to be mailed by registered or certified United States Mail, return receipt requested and addressed to the following:

TO THE SELLER:	Erpenbeck Commercial Enterprises, Inc. Attn.: Mr. Ronald Erpenbeck 4205 Dixie Highway Elsemere, Kentucky 41018
TO THE BUYER:	Hyper Shoppes, Inc. Attn.: Mr. Pierre Wevers 4450 Eastgate Blvd. Cincinnati, Ohio 45245
TO ESCROW AGENT:	Thomas R. Nienaber, Esq. Busald Funk Zevely, P.S.C. 226 Main Street Florence, Kentucky 41042

or to such other address as either party hereto shall, from time to time, designate to the other party by Notice in writing as herein provided.

12. ESCROW AGENT

Thomas R. Nienaber joins in the execution of this Agreement for the express purpose of (a) acknowledging

receipt (subject to collection) of the Earnest Money deposit lodged by Buyer with Escrow Agent hereunder; and (b) agreeing to be bound by the provisions set forth in this Agreement with respect to the disbursement of the Earnest Money. Buyer and Seller hereby authorize the disbursement and delivery of the Earnest Money in accordance with the terms and provisions set forth in this Agreement. If, however, in the sole discretion of the Escrow Agent, some doubt exists as to when, whom or under what circumstances such Earnest Money shall be disbursed hereunder, and the parties hereto are unable after ten (10) prior written notice thereof from Escrow Agent to agree and direct Escrow Agent in writing as to when, whom or under what circumstances Escrow Agent shall disburse same, Escrow Agent shall be entitled to interplead said Earnest Money into the Boone Circuit Court without further liability or responsibility on its part. Costs, expenses and attorney fees incurred by Escrow Agent in connection with any such interpleader may be deducted by Escrow Agent from the amount of the Earnest Money prior to its deposit into the registry of the Court. In any event, however, all parties agree that Escrow Agent shall have no liability or any further responsibility to any party or person whomsoever for any disbursement of the Earnest Money made by Escrow Agent in good faith, unless such disbursement shall constitute a willful breach of the duties and obligations of Escrow Agent under this Agreement or gross negligence on the part of Escrow Agent. It is acknowledged by Buyer that the services of Thomas R. Nienaber rendered by him in his capacity as Escrow Agent shall not be construed as a conflict of interest and that Thomas R. Nienaber is in fact counsel for Seller herein. Buyer further acknowledges that the representation of Thomas R. Nienaber with respect to the Seller herein shall continue

after the closing hereof and that such continued representation shall not be construed as a conflict of interest by virtue of those services rendered as Escrow Agent.

13. TERM OF OFFER

This Agreement has been executed first by Seller as a continuing offer to sell the Property, subject to and conditioned upon the terms and conditions herein cotained, which offer shall be open for acceptance by Buyer until 6:00 o'clock p.m., August 20th , 1989, at which time the offer shall be deemed to be withdrawn. MP for PAW

14. AUTHORITY

Each of the undersigned hereby warrants and represents that he is authorized to execute this Agreement on behalf of the entity whose name he is signing under, and that his signature shall be binding upon such entity. Buyer and Seller acknowledge by the execution hereof, that all corporate action has been taken pursuant to and by duly authorized and adopted resolution of their respective Boards of Directors.

15. TERMINATION

(a) Buyer shall be reserved the option to terminate this Agreement for any reason, in Buyer's sole discretion and judgment, prior to the later of February 28, 1990 or 30 days after Seller has obtained the zoning approval pursuant to Paragraph 5.

(b) In the event that the Buyer should so elect to terminate this Agreement then:

(i) If Buyer elects to terminate this Agreement prior to February 28, 1990, and planning and zoning approval

for the submitted Concept Development Plan has not been obtained at the time of termination, then and in such event, Buyer shall be refunded all Earnest Money and accrued interest.

(ii) If Buyer should elect to terminate this Agreement after February 28, 1990 but prior to the time that Seller has obtained the zoning approval pursuant to Paragraph 5, then and in such event, Escrow Agent shall pay to Buyer all of the Earnest Money paid to date, with all accrued interest thereon.

(iii) If Buyer exercises this option to terminate and Seller has obtained the required zoning approval at the time of termination, then Escrow Agent shall pay to Seller and Seller shall be entitled to retain as its sole and separate property, all of the Earnest Money paid to date, with all accrued interest thereon.

(c) At the time of termination and distribution of the Earnest Money as provided for in Paragraph 15(a) and (b), this Contract shall become null and void with neither party having any further obligation to the other. All costs and expenses incurred by Seller in order to obtain approval of the Concept Development Plan shall not be reimbursed to Buyer by Seller; however, any all remaining moneys held by Seller to be applied to costs and expenses shall be immediately refunded to Buyer.

(d) In the event that Buyer should fail to terminate this contract as provided for in Paragraph 15(a) and planning and zoning approval under Paragraph 5 is obtained, Buyer shall be bound by the terms and conditions hereof and Seller shall be reserved any and all causes of action against Buyer including but not limited to retention of all Earnest Money and extension monies paid by Buyer to Seller plus all accrued interest; specific

performance; and any and all other causes of action as reserved Seller under Kentucky Law.

16. BINDING EFFECT

This Agreement shall be binding upon the respective parties, their successors, heirs and assigns. This contract may be assigned by the Seller or the Buyer provided that any such assignment will not release the parties of any liability hereunder.

17. GENERAL PROVISIONS

No failure of either party to exercise any power given hereunder or to assist upon strict compliance with any obligations specified herein, and no customer practice at variance with the terms hereof, shall constitute a waiver of either parties right to demand exact compliance with the remaining terms and conditions hereof. This Agreement contains the entire Agreement of the parties hereto and that no representations, inducements, promises or Agreements, oral or otherwise, between the parties not embodied herein, shall be of any force or effect. Any amendment to this Agreement shall not be binding upon the parties hereto unless the such amendment is in writing and executed by all the parties. The provisions of this Agreement inure to the benefit of, and be binding upon the respective parties, their heirs, administrators, executors, personal representatives, successors and assigns. Time is of the essence of this Agreement. This Agreement shall be interpreted under the laws of the Commonwealth of Kentucky.

Seller's election to retain any and all Earnest Money in the event of default by Buyer shall not act as or constitute a waiver of any and all other remedies available to Seller under Kentucky Law in the event of breach of this

Agreement by Buyer. The return of Earnest Money to Buyer in the event of default by Seller shall not act as or constitute a waiver of any and all other remedies available to Buyer under Kentucky Law in the event of breach of this Agreement by Seller.

18. SURVIVAL OF OBLIGATIONS

The covenants, representations and warranties set forth in this Contract shall survive any Closing under this Contract.

IN WITNESS WHEREOF, Seller has caused this Agreement to be executed by and through its president, Ronald Erpenbeck, pursuant to duly authorized and adopted resolution of its Board of Directors this ___ day of _____, 1989.

ERPENBECK COMMERCIAL ENTERPRISES, INC.

By /s/ Ronald Erpenbeck
Ronald Erpenbeck, President

Dated: 8/17/89

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF BOONE)

SUBSCRIBED, sworn to and acknowledged before me by the said Ronald Erpenbeck, President, Erpenbeck Commercial Enterprises, Inc., acting pursuant to duly authorized and adopted resolution of its Board of Directors this 17 day of August, 1989.

/s/
Notary Public

My Commission Expires: 5/25/91

IN WITNESS WHEREOF, Buyer has caused this Agreement to be executed by and through Pierre Albert Wevers, its Executive Vice President pursuant to duly authorized and adopted resolution of its Board of Directors this 17th day of August, 1989.

HYPER SHOPPES, INC.

By /s/

Dated: August 17, 1989

STATE OF Ohio)
) SS;
COUNTY OF Clermont)

SUBSCRIBED, sworn to and acknowledged before me by the said Pierre-Albert Wevers, Executive Vice President of Hyper Shoppes, Inc. acting pursuant to duly authorized and adopted resolution of its Board of Directors this 17th day of August, 1989.

/s/ Janice K. Dean
Notary Public
My Commission Expires: 1-1-92

APPENDIX C

DEED

KNOW ALL PERSONS BY THIS INSTRUMENT:

That ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky Corporation,

the GRANTOR(S), for and in consideration of One ($1.00) Dollar and other good and valuable consideration as certified to below, paid to the GRANTOR(S) by the GRANTEE(S) herein, the receipt of which is hereby acknowledged, do(es) bargain, sell and convey to the following named GRANTEE(S),

WACO OIL COMPANY, INC., a Kentucky Corporation, its

successors and assigns forever, the following described real estate, in the county of BOONE, and state of KENTUCKY, to wit:

Street Address: Kentucky 18, Boone County, Kentucky

Grantee(s) Address: 119 Gerard Street, Covington, Kentucky 41011

Grantor(s) Address: 4205 Dixie Highway, Elsmere, Kentucky 41013

Z & S: _ _ _ _ _ _ _ Group: 2026

Located in Boone County on the east side of Ky. 18 approximately 0.7 miles southeast of the intersection with Ky 237 and being more particularly described as follows:

Beginning at a point in the east right of way of Ky 18, said being 110 feet right of Station 158+78 and a corner with Lee Vesper, Trustee, thence with Vesper N 76-02 E. 1027.25 feet to a point; thence with a new division line S 13-58 E, 272.99 feet to

a point in the center of a proposed roadway; thence with the proposed centerline S 66-21-14 W, 131.72 feet to a P.C. of a curve; thence with the curve to the right 129.22 (R=300.00 delta = 24-40-46) to a point; thence N 88-58 W, 143.54 feet to a P.C. of a curve; thence with the durve to the left 130.91 feet (R=500.-- delta = 15-00) to a point; thence S 76-02 W. 163-47 feet to a P.C. of a curve; thence with the curve to the left 87.63 feet (R=125.00 delta = 40-10) to a point; thence S 35-52 W. 21.59 feet to a point on the east right of way of Ky 18; thence with said right of way N54-48-25 W. 368.00 feet to the point of beginning.

Containing 5.50 acres.

BEING the same property conveyed to the Grantors herein by deed from BARRY J. WILLIAMS and SERAFINA S. WILLIAMS, husband and wife, dated August 1, 1989, and recorded in Deed Book 418, page 266 of the records in the Boone County Clerk's Office at Burlington, Kentucky.

* * *

[Plat Map Omitted in Printing]

* * *

Together with all the privileges and appurtenances to the same belonging. To have and to hold forever the same to the GRANTEE(S), in the fashion and manner stated above in the conveying clause, with covenants of general warranty, except all taxes and assessments due and payable in the year 1993, which are to be reasonably prorated as of the date of closing and which the GRANTEE(S) assume(s) and agree(s) to pay.

GRANTOR and GRANTEE both certify, under oath, that the consideration of $530,000.00 is the full con-

sideration paid for the property and GRANTEE joins in this deed for the sole purpose of making this certificate about the consideration.

Dated this 29th day of January, 1993.

GRANTOR:

ERPENBECK COMMERCIAL ENTERPRISES, INC.,
a Kentucky Corporation

By: /s/ Ronald Erpenbeck
RONALD ERPENBECK, President

GRANTEE:

WACO OIL COMPANY, INC.,
a Kentucky Corporation

By: /s/ Dan Conrad Pres.
NAME AND TITLE

STATE OF KENTUCKY, COUNTY OF BOONE (GRANTOR)

The foregoing instrument was sworn to and acknowledged before me this 29th day of January, 1993, by RONALD ERPENBECK, President of ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky Corporation, for and on behalf of the Corporation.

/s/ Lori Jean Fields Lee
Notary Public
My commission expires: 6-25-93
My jurisdiction is: STATE AT LARGE

STATE OF KENTUCKY, COUNTY OF BOONE (GRANTEE)

The statement about consideration in the foregoing instrument was sworn to and acknowledged before me

this 29th day of January, 1993 by Dan Conrad, President of WACO OIL COMPANY, INC., a Kentucky Corporation, for and on behalf of the Corporation.

/s/ Lori Jean Fields Lee
Notary Public
My commission expires: 9-25-93
My jurisdiction is: STATE AT LARGE

This instrument prepared by Ziegler & Schneider, P.S.C., Attorneys at Law, 200 Covington Mutual Building, 629 Madison Avenue, Covington, Kentucky 41011, by Lori Jean Fields Lee, Attorney.

This conveyance has been authorized by Resolution of the Board of Directors of Grantor and the person(s) signing on behalf of Grantor have also been authorized to do so.

The Grantors herein hereby adopt the convenience plat attached hereto and incorporated herein by reference.

Subject to conditions, restrictions and easements contained in deeds and instruments of record.

STATE OF KENTUCKY,)
) Sct.
COUNTY OF BOONE,)

I, JERRY W. ROUSE, Clerk of the County Court in and for the county and state aforesaid, do hereby certify that the foregoing is a true and correct copy of the original on record in Deed Book, 501, Page 265-268 records of the Boone County Clerk's Office.

Given under my hand and official seal, this the 21 day of March, 1995.

JERRY W. ROUSE, Clerk
By: D. Lope, D.C.

APPENDIX D

BOONE COUNTY PLANNING COMMISSION
BUSINESS MEETING
Ellis Cooperative Extension Center
January 18, 1995
8:00 P.M.

Mr. William Viox, Chairman, called the meeting to order at 8:15 P.M.,

COMMISSION MEMBERS PRESENT:
Mrs. Judy Arnett
Mr. William Bailey
Mr. Fred Burch, Vice Chairman
Mr. Phil Damstrom
Mr. Robert Kirby, Jr.
Mr. Gayle McElroy
Mr. Don McMillian
Mr. Bob Millay
Mr. Barry Neltner
Mr. Robert Ries
Mr. Ralph Rush
Mrs. Linda Schaffer
Mrs. Carol Smith, Secretary/Treasurer
Mr. William Viox, Chairman
Mr. Earl White

All members were present.

LEGAL COUNSEL PRESENT:
Mr. Dale Wilson

STAFF MEMBERS PRESENT:
Mr. Kevin Costello, AICP, Executive Director
Ms. Jan Hancock, Secretary

Mr. Robert Jonas
Mr. Mitch Light
Mr. Kevin Wall

Approval of the Minutes:

Chairman Viox stated that each Commission member had received copies of the Minutes of the January 4, 1995 Public Hearings and Business Meeting. He asked if there were any comments or corrections.

There being no changes to the Minutes, Mr. McMillian moved that the Minutes be approved as mailed. Mrs. Smith seconded the motion and it carried unanimously.

UNFINISHED BUSINESS:

1. *Zoning Map Amendment*

   The request of *ERPS, Inc. (applicant)* for *ERPS, Inc., W. Thomas and Catherine Erpenbeck, Raymond and Carole Erpenbeck, Ronald and Patricia Erpenbeck, and Lawrence and Barbara Erpenbeck (owners)* for a Zoning Map Amendment on a 466-acre site located on both sides of U.S. 42 and on the north side of Mt. Zion Road, Florence and Union, Kentucky. The request is to rezone the site from Suburban Residential One (SR-1) to Residential Planned Development (RPD) and Commercial Two/Planned Development (C-2/PD) in order to allow a mixed use residential/commercial development, Plantation Pointe.

   Staff Member Kevin Wall read the Committee Report which recommended approval of the request based on the findings of fact, but subject to conditions (See Committee Report). Mr. Wall offered to review any of the changes in the project.

Mr. Barry Neltner, Committee Chairman, stated that it has taken quite a while to get to this point. He thanked Mr. Ray Erpenbeck for working with the Committee through the process.

Mr. McMillian asked if the new highway conflicts with the plan. Mr. Wall advised that it does not.

Chairman Viox asked if there were any comments from the applicant. Mr. Ray Erpenbeck stated that he appreciated working with the Committee. Chairman Viox thanked Mr. Erpenbeck for bringing the plan before the Commission. He stated that it is an excellent plan and he looks forward to Plantation Pointe.

Mr. Burch moved by resolution to the cities of Florence and Union to approve the request based on the Staff and Committee Reports including the conditions. Mr. Neltner seconded the motion.

Mrs. Schaffer stated that the Committee did a very good job. She questioned if the single-family attached, carriage homes, and condominiums are to be owner occupied. She does not want them to apply for multi-family, which could be four families that own. Mr. Ray Erpenbeck stated that the attached single-family residences and the carriage homes will be owner occupied. Mrs. Schaffer asked if this should be stated in the conditions. Mr. Wall replied "no". Mrs. Schaffer stated that it is important. Mr. Costello stated that it is implied in the application, all of the information submitted, and in the testimony. He stated that the apartments refer to the multi-family section only, which was discussed at length before the full Committee.

Counselor Wilson asked if the applicant would agree to submit a letter, to be included as part of the Devel-

opment Plan, stating that single-family attached and condominiums will be owner occupied. Mr. Erpenbeck replied "I will do that".

Mrs. Schaffer questioned if the project stops if some of the conditions do not occur. Counselor Wilson advised that, depending on the condition, that is probably correct. He noted that there is a condition that the road has to be all the way built thru before a Certificate of Occupancy can be issued. He stated that when a zone change is approved subject to a Concept Development Plan and a condition is not followed thru, the statutes say that the zone change is not lost and the property does not revert back to the prior zoning without having a Public Hearing to determine whether failure to meet that condition would cause that to happen.

Mr. Costello stated that with Oakbrook and Triple Crown, the conditions have been looked at as each phase comes on line, which will be done in this case. Mr. Wall reviewed Condition #16 in this regard.

Mrs. Schaffer referred to Condition #3 and questioned areas 11 A, B, and C. Mr. Wall indicated those three commercial areas on the plan. He stated that through the Committee review process, there was a general consensus that commercial uses should become much more limited in range of uses and intensity the further west they go. He stated that Mr. Erpenbeck divided Area 11, which is located along U.S. 42, into three areas (11 A, B and C) and prepared use lists (which are attached to the Committee Report). Mr. Burch stated that it was agreed that everything from the main road coming in on 11 B and C would be O-1 uses. Mr. Wall agreed and added that Area 12 was proposed to be generally C-2 uses, and Area 3 was to be

generally C-1 uses. He stated that Area 11 is normally what is included in C-2, with some exclusions. Area 3 is what is in C-1 with the exception that the intensity has been limited to 10,000 square feet per acre. Areas 11 B and C have been combined to allow O-1 uses for the area between the collector road and the western boundary of the site. Area 12 is a combination of C-1 and O-1 uses.

Mrs. Schaffer stated that it is not in the letter that 11 B and C will be O-1 uses. Mr. Wall referred to Condition #3 which indicates how the use lists apply. He stated that the Committee did not have a problem with the use lists and the concern was the parts of the project they were being applied to. Mrs. Schaffer stated that Condition 3. B. says that the allowed uses for Areas 11 B and 11 C "shall be exclusively those listed in the applicant's letter . . .". Mr. Wall stated that they are using the list, but putting the uses towards different parts of the development. He stated that the uses will be O-1 only.

Mr. Kirby noted Mrs. Schaffer's comments regarding the single-family and detached homes being something other than owner occupied, and that the applicant agreed to provide a letter stating that they would be owner occupied. He asked if an owner would be precluded from renting the home in the future while it was on the market for sale. Counselor Wilson explained that the owners would occupy the dwellings and not purchase them solely for investment purposes. Mr. Kirby stated that the restriction would apply to the first time the home is purchased. Counselor Wilson stated that that would be a fair answer to the question.

Mrs. Smith questioned the location of the land to be donated for the school. Mr. Erpenbeck indicated an area shown in orange on the plan. Mr. Neltner stated that there was a lot of discussion in regard to the school site. He stated that the depth of the commercial and office areas is approximately 400 feet and the way the ground lays, the school will have visibility from U.S. 42. Mrs. Smith stated that the visibility was her concern.

Mr. Ries stated that the Committee and Mr. Erpenbeck did an excellent job working together on this project and he commended them both.

There being no further comments, Chairman Viox asked for a vote on the motion made by Mr. Burch and it carried unanimously. Counselor Wilson advised interested parties to follow up with the Union and Florence city councils as they have the final say.

Mr. McElroy left the meeting at this time.

2. *Utilization of an Underlying Zone in a Planned Development*

The request of *Gary Gregory and Brad Denzia (applicants)* for *Matthias and Laverne Toebben (owners)* for the Utilization of an Underlying Zone in a Planned Development in order to construct an 8,800 sq. ft. AutoZone auto parts/accessory store on a 1.1-acre parcel located at Highway 42 and Old Toll Road, Florence, Kentucky. The site is zoned Commercial Two/Planned Development (C-2/PD).

Staff Member Bob Jonas read the Committee Report which recommended approval of the request based on the findings of fact, but subject to conditions (see Committee Report).

Mr. Kirby moved by resolution to the Florence City Council that the request be approved based on the Staff and Committee Reports. Mr. Bailey seconded the motion.

Mr. Ries stated that on the original plan the area in front of the dumpster was considered a loading area. He asked if it is still a loading area. Mr. Jonas advised that it is still a loading area, but shipping and receiving will be done after hours. Mr. Ries asked what it will look like. Mr. Jonas stated that it is a one-bay garage.

APPENDIX E

COMMITTEE REPORT

TO: Boone County Planning Commission

FROM: Barry Neltner, Chairman

DATE: January 3, 1990

RE: Request of *Erpenbeck Commercial Enterprises, Inc. (applicant)* for *Enterprise VI or Dennis Vesper and Alicia Vesper (owners)* for the Utilization of an Underlying Zone in Planned Development on a 43.45 acre site located on the north side of KY 18 and east of Limaburg Creek Road, Boone County, Kentucky. The site is currently zoned Commercial Two/Planned Development (C-2/PD). Boone Crossing, a 447,600 square foot retail center, is being proposed.

REMARKS:

We, the Committee, recommend denial of the request based upon the following statements and findings of fact.

FINDINGS OF FACT

CONCEPT DEVELOPMENT PLAN

1. The proposed uses and building density as stated on the submitted Concept Development is not consistent with Article 15 of the *Boone County Zoning Regulations* and the criteria used to evaluate Planned Development (PD) requests under the applicable regulations.

   a. The submitted Concept Development Plan, proposed uses and design are not innovative nor do they offer a mixed-use of a substantial value than

would be normally allowed under conventional zoning requirements as stated in the *Boone County zoning Regulations*.

The proposed uses and scale of development are not appropriate given the nature of the adjoining residential and small scale commercial land uses and zoning either existing or planned for the Florence-Burlington (KY 18) corridor. The proposed type and scale of commercial uses are not presently located along KY 18 from Houston Road to Burlington (the governmental center) nor are they proposed or planned for the future.

b. As stated in the *Boone County Zoning Regulations*, the Commercial Two (C-2) underlying zoning district serves as a reference point to determine permitted uses if the other requirements of Planned Development (PD) are met. The submitted plan and proposed uses and their intensities do not meet the other requirements stated in Article 15. These requirements include but are not limited to building dimensional standards, a more useful pattern of open space, a development pattern which utilizes the natural topography, a more efficient use of the land and a development pattern in harmony with land use densities, transportation facilities, community facilities and the objectives of the Comprehensive Plan.

c. The submitted Concept Development Plan does not demonstrate a development pattern which preserves and utilizes the natural topography, scenic vistas (KY 18 corridor), trees and prevents the disruption of natural drainage patterns as required in Planned Development (PD). The Plan is over 90 percent impervious cover, either building or pavement from parking, circulation or loading areas.

The submitted Concept Development Plan shows no landscaping features, or the retention of existing vegetation, to soften the tremendous visual impact of the paved parking area from public view (KY 18). To further illustrate this point, the submitted Concept Development Plan indicates only a 10 foot non-paved area between the KY 18 right-of-way and the interior ring road to screen the extremely large parking area located in front of the proposed retail center. In addition, due to the scale or size of the project and existing topography of the site, massive earthwork will be required to cut and fill the site. Consequently, the natural drainage system of the site will be disrupted and will be relocated off the site.

The proposed uses and location of the uses severely impact the site's physical assets. No attempt was made to rearrange the proposed uses to preserve the existing heavily wooded area on the site. The submitted request did not take into consideration the visual impact of the loss of this wooded area or the public view of the large parking areas in front of the retail center.

d. The proposed uses and submitted Plan do not fit the development pattern in harmony with land use density, transportation facilities, community facilities and objectives of the Comprehensive Plan. The applicant has indicated that the building intensity of the proposed project is 9,266 square feet per acre. This intensity was derived by combining the acreage of the C-2/PD zoned property and the I-1 zoned property. The correct building intensity is approximately 12,862 square feet per acre or 447,600 total square footage located on approxi-

mately 34.8 acres zoned C-2/PD. This figure is considered to be very intense in terms of the adjoining commercial uses. The Heritage Hill Industrial Center Subdivision was approved at an intensity of 6,447 square feet per acre.

e. The proposed development will have a tremendous impact on the existing roadway network (KY 18 and KY 237) extending from I-75 and I-275. The existing traffic volume on KY 18 at the site location is approximately 2,342 vehicles per hour at the P.M. Peak Hour, (from applicant's TIA, Figure 5) The total amount of traffic estimated to be generated by the development at full build out (again from the applicant's TIA, Table 3) is 2,929 trips. The amount of traffic generated by the proposed development compared to the existing traffic volume of KY 18 is significant. The traffic generated by the proposed development has the potential to double the existing amount of traffic on KY 18 during the most heavily traveled hours. This would greatly decrease the capacity of KY 18 which is needed for future development of Boone County. The intent of the Access Management Regulations is to ". . . permit reasonable speeds and economy of travel while maintaining the capacity of the roadway. . .". Overall, the submitted Concept Development does not demonstrate the combination of various land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area to justify the deviation from standard district regulations.

BOONE COUNTY COMPREHENSIVE PLAN

2. The Proposed uses and submitted Plan are not in agreement with the 1989-1990 Goals and Objectives of the *Boone County Comprehensive Plan.*

Overall Objective

> "Residential, commercial, industrial and institutional uses can co-exist provided proper design principles are applied in developments to minimize frictions created by activities of whatever diversity."
>
> "The future growth and the redevelopment of areas shall be accompanied by adequate infrastructure and services."

Because of its scale and its expected impact on the community, the proposed development would require significant road and utility improvements in order to support the retail portion of this site. The applicant has failed to provide the assurance that these improvements will be made.

Environment

The project as proposed contradicts one of the Environment objectives of the Comprehensive Plan.

> "New development shall be designed in harmony with the physical environment in such a way that each site's existing physical assets are used beneficially."

Due to the scale of the project, the site's assets (e.g. trees, drainage swales, and existing topography) will have to be completely removed including the possible the Silvery Salamander and the Running Buffalo Clover.

Business Activity

> "Appropriate locations for industries or businesses compatible with others located in Boone County are provided."

The scale of the proposed use conflicts with adjoining smaller scale and less intense commercial uses and existing businesses located along KY 18. The Committee believes there are other more appropriate locations in Boone County for the proposed regional development as stated in the Comprehensive Plan.

The proposed project also conflicts with a commercial objective of the Business Activity Element. Large scale mixing of commercial and non-commercial uses shall occur in Planned Developments only when consideration can be given to assure compatibility with surrounding land uses. The proposed design of the commercial center suggests only large scale retail uses instead of providing professional office and service related uses needed for the nearby residential population and the eventual industrial development located directly north of the site.

Transportation

The applicant has not adequately addressed the traffic impact the proposed project will have on the existing transportation network in Boone County. Specifically, the transportation concerns raised at the Public Hearing relating to a increase in the number of traffic accidents along KY 18, and a decrease in the level of service at intersections have not been resolved. The Comprehensive Plan discusses the need for access management and to protect the traffic capacity of major roads like KY 18 in Boone County.

3. The proposed uses and submitted Plan are not in agreement with the 1986 *Boone County Comprehensive Plan*.

   a. The Comprehensive Plan describes areas of future commercial activity. The primary focus of commercial activity is and will remain in the future in Florence. The City of Florence, because its location to the interstate road system and access is well suited for the expansion and the retention of commercial businesses with a regional draw. Page B-14 of the Land Use Element describes this type of activity.

      "Since the immediate Florence area figures so prominently in the County's commercial activity, this region has the momentum to continue dominating construction of commercial structures. Many problems with the location and arrangement of commercial enterprises have emerged, however, especially along KY 18 and US 42. Along KY 18 in the I-75/Mall Road/Houston Road area, there are many traffic problems that can be worsened by adding commercial access points. The land surrounding the U.S. 42 area south of Florence, will experience additional growth towards the City of Union. Any commercial developments in these areas should be limited in scale and clustered to serve growing residential neighborhoods. Ideally, these commercial clusters should not function as an extension of Florence and Mall Road, but as a distinct unit serving the Union area. This should apply to the Limaburg area as well. The commercial development in this area should coordinate closely

with the projected high and medium density residential development to form a more coherent community rather than just a strip extending out of Florence."

Specifically, commercial uses in the Limaburg/KY 18 area or the project area should not be similar in nature and scale as to the type located on Mall Road.

b. In the Transportation Element of the Comprehensive Plan, there is a reference to the construction a road across Airport property to connect Mineola Pike with KY 18. Such a road would alleviate existing and potential traffic problems by providing alternate transportation routes for the public. As stated at the Public Hearing and in a letter from the Kenton County Airport Board and the Federal Aviation Administration (see attached letters), this road is not constructed nor is it planned to be constructed in the future. It is obvious that the "effective and efficient use of highway facilities" will not occur without the construction of the road.

c. The text of the Land Use Element of the Comprehensive Plan suggests that the "KY 18 corridor will be a mixture of all types of development." In addition, the proposed scale of the project and regional focus contradicts the text of the Land Use Element, which stresses that the "Mall Road area will continue to grow as a regional shopping area and its spill over onto US 42, KY 18 and Houston Road will be evident, thus, needs to be substantially controlled." Consequently, the design and location of the KY 18/I-75 Interchange, US 42/I-75 Interchange, and the new Mall Road/I-75 Interchange encourages the location of large scale retail regionally focused development to be confined to the Mall Road area. The

Comprehensive Plan discusses the importance of limiting regional retail development to select areas. The Comprehensive Plan states that "regionally oriented commercial development, should be retained to the Mall Road area." The basis for this statement is the current trend of this type of commercial development occurring there now and the introduction of the I-75/Mall Road Interchange to serve this type of development. This is well documented in the Comprehensive Plan. The Comprehensive Plan also notes the existing and potential traffic problems on KY 18 and recognizes that these problems can be worsened if regionally oriented commercial or retail uses similar to the existing retail businesses along Mall Road are built along KY 18. In addition, KY 18 is the main artery to Burlington and the existing and future planned growth of Boone County. Even though the I-75/Mall Road Interchange is planned to reduce some of the existing traffic congestion problems on KY 18 and Mall Road, it was not designed to alleviate future trips related to growth along KY 18 towards Burlington.

LAND USE COMPATIBILITY

4. The proposed project and its regional orientation at this location as stated, and depicted graphically in the applicant's traffic study is not appropriate given the site's location from I-75 (approximately 2 miles) and from I-275 (approximately 5 miles). Also, the scale of the proposed project is not compatible with the scale and impact upon the community compared with the existing businesses located along KY 18 from Houston Road to the governmental center of Burlington.

5. The proposed project and its expected traffic impact doesn't meet the design and purpose of Burlington Pike or KY 18. The proposed project would severely impact the movement of traffic from Florence to Burlington or the County's governmental center. This road primarily serves the local population of Burlington and Oakbrook Subdivision and is not intended to predominantly serve regional traffic from I-75 and I-275 that the proposed project would draw from if the retail center were constructed.

6. The applicant has failed to determine the full impact of the project since the applicant's traffic study did not include a thorough analysis of projected residential growth and business expansion adjacent to the site and along the KY 18 corridor. This growth includes but is not limited to the existing population counts and projections of Oakbrook Subdivision, the increase in residential population in Burlington, the adjoining commercial uses in the Heritage Hill Industrial Center Subdivision and the remaining industrially zoned property located to the north. Also, with the opening of Oakbrook Road from KY 18 to Pleasant Valley Road, the traffic analysis did not take into account the anticipated traffic from the new residential development along Pleasant Valley Road.

7. The scale or size of this development requires a significant amount of off-site improvements in order to accommodate the proposed development on the 43.45 acre site. These off-site improvements include but are not limited to sanitary sewer line improvements to the Oakbrook Treatment Plant, the construction of two major access roads, and the development of a detention/retention system northwest of the 43.45 acre parcel. The development of such a detention/retention

system would drastically disrupt the natural drainage pattern as specified in the Planned Development criteria. In addition this development as proposed would require the paving of a large loading/unloading and parking area on industrially zoned property located directly behind the retail center.

8. The proposed uses and the large scale of the regionally focused retail center are not compatible with the large amount of employment or industrial zoning (e.g. 250-300 acres) that is located to the north of this site. First, the development would result in an enormous traffic impact in terms of increased traffic volume on surrounding roadways and the concern of mixing of industrial and retail traffic traveling onto KY 18. Second, there is a concern for utilizing an entrance designed for major retail use and at the same time serving a large industrial park.

9. The proposed project is not compatible with the adjoining properties to the south and east. Located to the south is a large residential community (Oakbrook—approximately 1,800 dwelling units and over 6,000 residents at full build out) within 500 feet of this project. Located to the east are approved automotive related uses. These uses were adopted as part of a zone change request prior to the adoption of the 1986 Comprehensive Plan. Unlike the applicant's submitted Concept Development Plan, these uses are not predominately regional draws and they are not developed with the same intensity as the project site. Therefore, they are compatible with the adjoining residential land uses. Automotive related use traffic is usually more dispersed during a 24 hour period, and obviously the scale of these individual uses are different in terms of community impact than the applicant's proposed project.

10. The uses that are proposed by the applicant are generally located near an interstate with an adequate road system in place to handle anticipated traffic. In addition, the underlying zone or the C-2 zoning district allows other retail and offices uses that are not normally high traffic generators. Those type of uses are presently located along the KY 18 corridor from Florence to Burlington. These uses serve the local population as intended and are indicated in the Comprehensive Plan. The submitted Concept Development Plan and proposed uses do not address the Comprehensive Plan's desire to encourage the retail, office and service related needs of the Oakbrook and Burlington populations, but rather the predominant needs of a regional population.

TRAFFIC

11. The applicant's traffic study does not fully address the development's impact on the existing roadway system.

    a. The applicant's study failed to evaluate the impact of the additional retail space in the proposed center and the out-lots, which would include an additional 240,000 square feet as stated in the applicant's Traffic Impact Analysis planned for the site. The study's conclusions were based upon Phase I of the development or just 337,000 square feet of retail use.

    b. The applicant's study does not evaluate the associated traffic from other developments in the area such as the expansion of Oakbrook Subdivision and Heritage Hill Industrial Center and other developments than have been approved. These future developments should be included in order to make the com-

plete analysis of the traffic impact on the community.

c. The applicant's study includes in Phase II traffic generated from 500,000 square feet of industrial use on the industrially zoned property to the north. This figure may be under estimated given the potential development of 250-300 acres under the current zoning regulations would allow up to 6,250,000 squ square feet of industrial use.

d. The applicant assumes that 50-60 percent of all traffic at the KY 18/I-75 interchange will use the new interchange for Mall Road. The conclusion of OKI, who prepared the study for the new ramps, is that a 30 percent reduction of traffic on KY 18 is expected. Further, the concern is that any increase in the capacity of KY 18 is protected for future growth of Boone County.

e. The applicant assumed the proposed airport road would handle 39 percent of the traffic generated by the proposed development. However, the applicant does not give an alternative if the airport road is not built, or where the 39 percent of the traffic will be routed. The Committee believes that KY 18 will be main road system for this proposed development and thus be most impacted.

The TIA analysis presented by the applicant therefore has not significantly analyzed the potential impact of the development on area roadways.

12. The applicant's Phase I conclusions of their traffic study were incomplete in terms of evaluating the impact of the entire retail development. By adding Phase II traffic, the applicant's traffic study showed that the development will reduce the LOS (level of service) of

intersections to unacceptable levels, as shown in Table 2. (see attached table) Further, these LOS calculations do not take account the additional future traffic generated by surrounding developments as discussed on Item 11.

13. The proposed design of the eastern access driveway (located off site or outside the 43.45 acre parcel) will not adequately handle the anticipated commercial traffic from the Boone Crossing development and future industrial traffic from the property immediately north of 43.45 acre parcel and Heritage Hill Industrial Center Subdivision.
14. The type of development being proposed should be located within close proximity of an interstate system and on an adequate transportation network with limited access in order to move a large amount of local and regional traffic efficiently. If this type of development was located at this site the traffic associated with this regional retail center would greatly affect the efficiency of the major thoroughfare from Florence to Burlington (KY 18) and KY 237 from the Camp Ernst area to Hebron.

CONCLUSION

The Committee would like to state that the Boone Crossings Concept Development Plan project was evaluated from a land use standpoint, which is the role of a Planning Commission. We recognize that this project would have a large economic impact on the community but then any project of this magnitude will have a large economic impact in terms of the number of jobs created and the taxes generated. The Boone County Planning Commission is charged with reviewing land use considerations, such as compatibility of the project with adjoining land uses, ade-

quacy of roads, access, utilities, signage, and public visibility for it is the land use impact which is ultimately felt by the community.

This site has many development possibilities, however, we do not believe that this is an appropriate use based on the information stated and for the reasons listed above. Further, we are of the opinion that this use could occur in Boone County if properly located.

/s/ Barry Neltner
Barry Neltner, Chairman

/s/ Larry Barnett
Larry Barnett

/s/ Fred Burch
Fred Burch

Phil Damstrom

/s/ Rector Jones
Rector Jones

/s/ Carol Smith
Carol Smith

BN:kat

APPENDIX F

COMMITTEE REPORT

TO: Boone County Planning Commission

FROM: Barry Neltner, Chairman

DATE: October 3, 1990

RE: Request of *Turfway Park Racing Association, Inc. (Owner)* for *Carroll Properties, Inc. (applicant)* for a Zoning Map Amendment on a +123.1 acre site located off both sides of the Houston Road Extension, both in Florence and in unincorporated Boone County, Kentucky. The request is to rezone the site from Office Two/Planned Development (O-2/PD), Suburban Residential Two/Planned Development (SR-2/PD), Public Facilities/Planned Development (PF/PD) and Recreation/Planned Development (R/PD), to Commercial Two/Planned Development (C-2/PD) in order to allow a mixed use office/commercial development and an entertainment and exhibition facility.

REMARKS:

We, the Committee, recommend approval of the above request based upon the following findings of fact and subject to the following conditions.

FINDINGS OF FACT

1. The existing zoning classification of the site, Office Two/Planned Development (O-2/PD), Suburban Residential Two/Planned Development (SR-2/PD), Public Facilities/Planned Development (PF/PD), and Recreation/Planned Development (R/PD), is inappro-

priate and the proposed zoning classification, Commercial Two/Planned Development (C-2/PD), is more appropriate due to the fact that the existing Houston Road Extension divides the site and, therefore, makes it less conducive for significant residential and office development as previously approved. Also, part of the Houston Road Extension is completed and represents a physical improvement already in place since the adoption of the *Houston-Donaldson Study*. In addition, some of the uses proposed, for example, the hotel use and the entertainment/mini-convention center use, are compatible with adjoining land uses and appropriate due to the presence of Turfway Park, a major recreational facility in Boone County and in Northern Kentucky.

2. The proposed uses as described on the submitted Concept Development Plan and subject to the conditions listed below generally meet the goals and objectives of Planned Development (as stated in Article 15 of the *Boone County Zoning Regulations*). In addition, some of the proposed uses will help maintain the employment character of the areas as outlined in the *Houston-Donaldson Study*. These uses are service related and are designated to protect the employment character of the area. KPC

3. The proposed uses and zoning are appropriate since the applicant has agreed to make significant roadway and utility improvements on and off the site and has agreed to phase the development. Also, the applicant has agreed to work with other property owners in the area, the Boone County Planning Commission, the City of Florence, and the Boone County Fiscal Court to help remedy the existing and forecasted traffic congestion around the I-75/

Turfway Road Interchange. These actions are in accordance with the *Houston-Donaldson Study*, which was designed to correlate Study area development with infrastructure improvements.

CONDITIONS

The applicant is being asked to agree to include these items as part of the Concept Development Plan in order to clarify the plan as presented at the August 22, 1990, Business Meeting. Further, these conditions are intended to clarify the suitable uses and development for the presented plan.

1. The applicant shall agree not to take occupancy of the proposed Bigg's building and enclosed mall until the construction of the Houston Road Extension to Donaldston Highway is completed and open to the public. The three proposed uses along Turfway Road Extension to Donaldson Highway. The applicant shall further agree not to take occupancy of any other new building until the construction of the Houston Road Extension is substantially underway.
2. The applicant shall make the necessary road improvements to the I-75 southbound exit ramp and Houston Road Extension as stated in the applicant's traffic study, application and the correspondence from the Kentucky Transportation Cabinet (dated August 22, 1990).
3. If deemed appropriate by the Boone County Planning Commission, the Kentucky Transportation Cabinet, and St. Luke West Hospital, the southern access to Parcel B shall be relocated north on the Houston Road and Turfway intersection. Such access should be located opposite from a new St. Luke West Hospital entrance.

4. The applicant will be required to share access from Parcel A to the adjoining properties to the north and south. Due to the planned shared access, the proposed ring road shall be designed to accommodate future traffic from the adjoining properties.
5. The proposed curb cut off Turfway Road serving Parcel B shall be limited to right turn in and out.
6. The proposed curb cut off the Houston Road Extension serving the major retail center on Parcel B shall be eliminated.
7. The proposed curb cut off the Houston Road Extension serving Parcel A and located closest to the northern property line shall be eliminated.
8. The applicant shall be required to negotiate with city/county officials to relocate all necessary utilities and to provide all necessary easements.
9. The applicant shall be required to pursue development of the proposed Entertainment/Mini-Convention Center facility in the first phase of development.
10. The applicant shall be required to build the proposed uses in accordance with the submitted Concept Development Plan presented at the August 22, 1990, Public Hearing with the exception of the proposed outlots on Parcel A. The outlot area shall be restricted to a maximum number of nine outlots with a total building square footage not to exceed 120,000 square feet. The proposed mix of office and commercial use will be 50% office and 50% commercial use for the outlot area.
11. The proposed Bigg's building and other associated anchor stores shall be moved approximately 50 feet northwest from the proposed location on the Concept Development Plan in order to expand the visual

buffer from I-75. Consequently, the proposed buildings will be at a minimum 150 feet from the I-75 property line.

12. All proposed buildings shall be subject to the design review procedure and standards as stated in the *Houston-Donaldson Study*. In addition, all roof equipment and loading areas from the proposed retail building along I-75 shall be sufficiently screened from public view (I-75) with the use of preserving existing trees, new landscaping plant material, decorative building materials, and decorative retaining walls. Water features shall be required along I-75 and the Houston Road Extension as part of this development. All building design shall be consistent and in harmony with the *Houston-Donaldson Study*.

BN stand within

13. ~~Generally~~, The existing trees located ~~approximately~~ 75 feet from the eastern property line shall not be removed. On the northern and southern property lines, all existing vegetation shall remain at a minimum 50 feet from each property line. Additional vegetation may be required to be preserved adjacent to the St. Luke West property at subsequent reviews. All trees to be removed on the site shall be identified on a subsequent development plan and reviewed and approved by the Boone County Planning Commission prior to any removal. The undisturbed areas shall be marked in the field and inspected by the Boone County Planning Commission.

14. The proposed development shall have at a minimum 22% green space. Each phase of the development submitted for review shall include calculations of

green space area. In general, landscaping plans for the project shall include the following:

a) Provide planting islands between every 10 to 15 spaces to avoid long rows of parked cars. The size should be a minimum of nine feet wide to allow for an adequate planting area. Each of these planting islands should provide at least one shade tree having a clear trunk height of at least six feet. For code required parking, one tree and three shrubs are to be utilized per 15 spaces.

b) Provide eight-foot wide landscape strips for every four rows of parking, or large planting islands at the ends of parking rows.

c) In addition, canopy tree plantings along the Houston Road Extension and other public streets of the proposed development shall be planted along with earthen berms as part of the application.

15. The applicant agrees to work with the City of Florence, Boone County, and area property owners and developers in arriving at a solution to the existing and forecasted traffic congestion at the Turfway Road/I-75 Interchange.

16. The applicant agrees to pay for the traffic signals which will be used to enter and exit the Bigg's site. The applicant shall negotiate with the Kentucky Transportation Cabinet and St. Luke West Hospital to place a traffic signal at the first entrance of the development off the Houston Road Extension.

This Committee recommendation upon approval by the Boone County Planning Commission is recommended to be forwarded to the City of Florence and the Boone County Fiscal Court. In addition, the Committee is recommending that the text of the *Houston-Donaldson*

Study and the *1990 Boone County Comprehensive Plan* be amended accordingly.

A copy of the Public Hearing minutes accompanies the findings and recommendation serving as a summary of the evidence and testimony presented by the proponents and opponents of this request.

/s/ Barry Neltner
Barry Neltner, Chairman

Rector Jones

/s/ Fred Burch
Fred Burch

/s/ Carol Smith
Carol Smith

/s/ Phil Damstrom
Phil Damstrom

Larry Barnett

Lawrence Collins

BN:mcb

CITY OF FLORENCE [SEAL]
Betsy R. Conrad
City Clerk

January 8, 1991

Mr. William R. Viox, Chairman
Boone County Planning Commission
P.O. Box 596
Burlington, KY 41005

Dear Mr. Viox:

Please be advised that Florence City Council declined to take action on the Planning Commission's recommendation regarding the request of **Turfway Park Racing Association, Inc. (owners) for Carroll Properties, Inc. (applicant)**, through your Resolution R-37-90. It is our understanding that the zoning map amendment stands approved as recommended in this instance.

Sincerely,

/s/ Betsy
Betsy R. Conrad

Copy: Bruce Janken, City Coordinator

Mailing Address:
P.O. Box 457 · Florence, Kentucky 41022-0457

Street Address:
7431 U.S. Highway 42 · Florence, Kentucky 41042
(606) 371-5495

APPENDIX G

AFFIDAVIT OF MIKE PHILLIPS

Comes now Mike Phillips and after being duly cautioned and sworn, states as follows:

My name is Mike Phillips, and I hold the position of Director of Real Estate of Hyper Shoppes Real Estate Company, Inc. Our organization is the real estate development arm of Biggs, a major regional retail developer. During 1989 and the early part of 1990 our company had a contract with Erpenbeck Commercial Enterprises, Inc., to purchase a parcel of land containing approximately 43 acres along Kentucky 18 in Boone County, Kentucky. That contract had a number of conditions and for various reasons set forth below, our company cancelled or terminated this contract with Erpenbeck Commercial Enterprises on or about January 11, 1990.

The parcel that was the subject of that contract had a zoning classification requiring review and approval of a concept development plan before it could be developed for a Biggs store. That approval had to come through the Boone County Fiscal Court and this approval, along with other conditions, was a requirement of the contract before our company would purchase the property. Under our contract, Erpenbeck Commercial Enterprises, Inc., was to be primarily responsible for preparation of an application with a concept development plan. Our company was responsible for some of the costs in the preparation of that plan, and before we could be obligated under our contract we had to approve that plan submitted to the Boone County zoning authorities.

In early December, 1989, the Boone County Planning Commission conducted a public hearing on the development plan submitted by Erpenbeck Commercial Enter-

prises, Inc. This plan as submitted to the Boone County authorities was not acceptable to our company and I personally informed Ray Erpenbeck of Erpenbeck Commercial Enterprises, Inc., that it was not acceptable to us. There were various problems with that plan, as we viewed it, most of which involved the transportation facilities or roadways to the site.

As a regional retailer, it is very important for us to have good access to interstate systems to allow regional customers access to our site. Erpenbeck Commercial Enterprises, Inc., had informed us that they could provide this access through a public use road through Airport owned property to the north of the Kentucky 18 location. This public use road would have close access to the interstate systems for regional customers from the north and west of the location. Without this type of access road to the site, we would not have been interested in pursuing actual purchase of the Kentucky 18 location.

Another major factor to us concerned the traffic study or design internally within the site as well as planned access from Kentucky 18. More specifically, regional traffic accessing our site from the west along Kentucky 18 did not have adequate or acceptable access to our location. Without acceptable access facilities for this eastbound regional traffic from the west, the site would not have been acceptable to us for purchase. This traffic study and design was part of the Erpenbeck submitted development plan.

Another important factor to our company was the public reaction opposing the Kentucky 18 site as a location for our company. It is our policy not to go where we are not wanted at any particular location.

Regarding internal traffic on site as reflected in the development plan submitted by Erpenbeck Commercial Enterprises, Inc., it was not designed in a way that was acceptable to our company. I informed Ray Erpenbeck, prior to its submittal, that we wanted the structure to be located along the rear property boundary line of the approximate 43 acres that was the subject of the contract. I informed Ray Erpenbeck that unless the structure was so located, we would not close or purchase the property. The importance to us is to have the structure located along the back boundary for this site so that we would have sufficient space to align parking and internal traffic flow in the way and manner our company prefers.

For all of these reasons, I informed Ray Erpenbeck that the concept development plan as submitted to the Boone County authorities was not acceptable to our company. Even if that development plan had been approved all the way through the Boone County Fiscal Court, our company would not have purchased or developed the property for a Biggs store.

In mid-February, I wrote a letter to Gerald Newton, Director of the Boone County Planning Commission, to schedule a meeting. In that letter I informed Mr. Newton that our company had terminated its contract on the Kentucky 18 property involving the Erpenbeck Commercial Enterprises proposal. My purpose in wanting to meet with Mr. Newton, as I expressed in that letter, was to discuss other locations or sites in Boone County that my company felt were more appropriate for Biggs. A meeting was scheduled for March 8, 1990, but that meeting never occurred because of the lawsuit filed by Erpenbeck Commercial Services and Enterprise VI.

After our company terminated its contract with Erpenbeck Commercial Enterprises, we received num-

erous proposals regarding other locations. However, none of these proposals came from the Boone County Planning Commission, its staff or its members. These proposals were either from property owners, real estate developers or real estate brokers from all over Southern Ohio and Kentucky. Some of these proposals came from Lexington and Louisville, Kentucky. Among the proposals sent to us was a proposal from Carroll Properties, Inc.

After meeting with Carroll Properties, Inc., and reviewing a potential site, our company entered into a contract, with several conditions, with Carroll Properties, Inc. It was only after our company decided on the Carroll Properties location that we ever met with Jerry Newton of the Boone County Planning Commission. Mr. Newton never expressed any opinion as to whether or not our project could be approved at the Carroll Properties site. He merely informed us of the procedures and what may be important factors to any review and approval for the location. Again, our company never met with Jerry Newton or the Boone County Planning Commission, its staff or members, regarding selection of any site until after we had already focused and decided on the Carroll Properties location.

The significance of the Carroll Properties location to our company was its accessibility to an interstate system. As with the Kentucky 18 site, our company anticipates that the vast majority of our regional retail customers will come from the north. We also wanted our site to have access to the west. A major consideration with the Carroll Properties contract is that we have no obligation to close or purchase until the Houston Road extension to Donaldson Highway is completed and open to the public. Another major consideration is the improvement to the

interstate highway I-75 and Donaldson Road interchange. Without this accessibility to the northerly and westerly regional retail customers, our company would not have been interested in the Carroll Properties location for a Biggs store.

Among the proposals our company received after terminating our contract with Erpenbeck Commercial Enterprises was a contact from the owner and developer of property located along Houston Road, south of its intersection with Turfway Road. That developer is Buchanan Development Corporation and the property is owned by N.K. Management, Inc. That property was not acceptable to our company for a Biggs store because of its limited accessibility to regional customers from the north. These customers would be using interstate highway I-75 and the ability of those customers from the north to access I-75 back to the north upon leaving that site is very restricted at the Turfway Road interchange with interstate highway I-75 and was not acceptable to us. Likewise, the interchange of I-75 and Kentucky 18 for the northbound traffic was viewed by our company as unacceptable and it is these two interchanges that would have to serve either the Buchanan location or the site of the Erpenbeck Commercial Services Project on Kentucky 18 west of Zig Zag Road.

CONCLUSION

To conclude, even if the Erpenbeck Commercial Services concept development plan as presented to the Boone County Planning Commission had been approved through the Boone County Fiscal Court, our company would not have purchased the property. The conditions in our contract with Erpenbeck Commercial Enter-

prises were not and would not have been met to our satisfaction in a timely manner.

Dated this 17th day of February, 1991.

/s/ MIke Phillips
Mike Phillips

State of Ohio
County of Clermont

This Affidavit was subscribed, sworn to and acknowledged before me this 18th day of February, 1991, by Mike Phillips.

/s/Betty K. Carter
NOTARY PUBLIC, State of Ohio
Betty K. Carter

My Commission Expires:
March 30, 1995

APPENDIX H

[Entered 12-30-92]
PAT GUTZEIT, CLERK
BOONE CIRCUIT/DISTRICT COURTS
BY /s/ D.C.

BOONE CIRCUIT COURT
CONSOLIDATED CIVIL ACTION
NOS. 90-CI-174 and 90-CI-175

ENTERPRISE VI, ET AL APPELLANTS/PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL APPELLEES/DEFENDANTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC., ET AL APPELLANTS/PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL APPELLEES/DEFENDANTS

ORDER OVERRULING MOTION
TO ALTER, AMEND AND VACATE

* * * * * * * * * * *

Plaintiff, Erpenbeck Commercial Enterprises, Inc., having moved to alter, amend and vacate this Court's Opinion and Order entered on November 20, 1992, this Motion being heard on December 22, 1992, with said Plaintiff's counsel present (Alex Talbott) and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that said Plaintiff's Motion to Alter, Amend and Vacate is overruled.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion to file as part of the record the proposed Opinion and Order tendered by Defendants is overruled. For explanation, the Court states as follows:

The Opinion and Order entered on November 20, 1992, granted Defendants Summary Judgment. The Court prior to rendering that Opinion and Order requested all parties to tender proposed Opinions and Orders for the Court's review. These proposed Opinions and Orders assisted the Court to focus on the issues contained within pending motions. The Court also had before it over 250 pages of memoranda supporting these pending motions and lengthy oral argument with representation by all parties had occurred.

None of the Plaintiffs filed objections or opposed this procedure, and at the hearing on this Motion to Vacate, Mr. Talbott confirmed that he had no objection then, nor opposition now to that procedure. Counsel for Enterprise VI did not tender an Opinion and Order, and has not filed any Motion to Vacate in this case. Moreover, counsel for Enterprise VI filed no objections or opposition to submittal of proposed Opinions and Orders.

The Opinion and Order granting Defendants Summary Judgment is not a blind entry or verbatim acceptance of Defendants' tendered Opinion and Order. This Court, after becoming very familiar with the pending motions and supporting memoranda submitted by all parties and hearing the lengthy oral argument, rendered the Opinion and Order as its decision on November 20, 1992. This

Opinion and Order as entered contains several additions made by this Court and is this Court's independent decision.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED, that, while inappropriate for Plaintiffs' counsel to attach a copy of its tendered Opinion and Order to its Motion, making it improperly part of this record, this Court does not direct that it be expunged.

/s/ [Illegible]
JUDGE, BOONE CIRCUIT COURT

Copies to:

Alex F. Talbott
2100 First National Tower
101 South Fifth Street
Louisville, Kentucky 40202

Paul J. Vesper
1005 Madison Avenue
Covington, Kentucky 41011

Larry J. Crigler
6024 Rogers Lane
P.O. Box 169
Burlington, Kentucky 41005

David A. Schneider
505 Turfway Ridge Office Park
7300 Turfway Road
Florence, Kentucky, 41042

Dale T. Wilson
7699 Tanners Lane
P.O. Box 756
Florence, Kentucky 41042